(26,417)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 400.

THE BIRGE-FORBES COMPANY, PETITIONER,

vs.

CARL R. HEYE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday in November, A. D. 1917, at Fort Worth, Texas, Before the Honorable Richard W. Walker and the Honorable Robert L. Batts, Circuit Judges, and the Honorable Rufus E. Foster, District Judge.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

versus.

CARL R. HEYE, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 21st day of March, A. D. 1917, a transcript of the record of the above
b styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3065, as follows:

c TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3065.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

Error to United States District Court, Eastern District of Texas.

U. S. Circuit Court of Appeals. Filed Mar. 21, 1917. Frank H. Mortimer, clerk.

1 In the United States Circuit Court of Appeals, Fifth Circuit.

No. —.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

In Error from the United States Circuit Court of Appeals, Fifth Circuit, to the District Court of the United States for the Eastern District of Texas, at Sherman.

Caption.

Be it remembered that at a regular term of the District Court of the United States in the Fifth Circuit thereof, and in and for the Eastern District of Te as, begun and held in the court room of said court, in the City of Sherman, in said district, on Monday, the 1st day of January, 1917, it being the first Monday of said month, and which term adjourned on the 10th day of January, 1917, the Honorable Gordon Russell, Judge, for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial and was tried, to-wit:

No. 83. D. L.

CARL R. HEYE, Plaintiff,

v.

THE BIRGE-FORBES COMPANY, Defendant.

2 In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES CO., Defendant.

To the Honorable Judge of said Court:

Carl R. Heye, plaintiff, comes now and by leave of court files this his first amended original petition, in lieu of his original petition

heretofore filed, and complaining of The Birge-Forbes Company, defendant, represents to the court:

I.

That plaintiff is a resident of the City of Bremen, Germany, and is a citizen of the German Empire; that defendant is a corporation duly incorporated and existing under and by virtue of the laws of the State of Texas; that defendant has its domicile and principal office and place of business in the City of Sherman in Grayson County in said Eastern District of Texas, and its president, N. B. Birge, and its secretary, N. A. Birge, reside in said County of Grayson; and that defendant is a citizen of the State of Texas and an inhabitant of the Eastern District of said State.

II.

That about November 1st, 1901, defendant, which was then and still is engaged in the business of buying, selling and exporting cotton, made a contract and arrangement with plaintiff, who was then and still is a cotton broker in Bremen, Germany, wherein and whereby defendant appointed plaintiff as its selling agent in said City
3 of Bremen, to make sales of cotton for it in said city. That said parties continued to act and to deal with each other under said contract and said arrangement until about May 1st, 1911. That said contract and arrangement remained practically the same throughout the course of the dealings of said parties with each other, but it was more specifically defined and explained from time to time prior to October 1st, 1910, by letters and communications between said parties.

That during October, 1910, and during all the time subsequent to said month until about May 1st, 1911, plaintiff and defendant were acting, operating and transacting business with each other under and in pursuance of said contract and arrangement as so defined and explained. That it was a part of said contract and arrangement as so defined and explained and as mutually understood and acted upon by both parties that all cotton offered by defendant for sale through plaintiff was to be even running cotton, of good color and staple; that all sales were to be made subject to and to be governed by Bremen class and arbitration; and that all sales were to be made subject to and to be governed by the rules of the Bremen Cotton Exchange.

III.

That acting under and in accordance with the aforesaid contract and arrangement, plaintiff made sundry sales for defendant, at Bremen, Germany, of large quantities of cotton during the time intervening between about October 1st, 1910, and about January 1st, 1911, such sales being made to a number of different buyers. That

the buyers of said cotton purchased the same under the rules
4 of the Bremen Cotton Exchange and subject to Bremen class and arbitration. That the rules of the Bremen Cotton Exchange required all disputes and controversies between seller and buyer as to the quality (the said term including grade and staple) of cotton sold to be conclusively determined and settled by means of arbitration, the procedure in such arbitrations being fully defined and set forth in the published rules of said Bremen Cotton Exchange.

IV.

That in the sales of cotton last aforesaid, made by plaintiff for defendant, disputes and controversies did arise between the seller and the buyers as to the quality of the cotton sold. That the buyers of said cotton made claims that the cotton delivered to them was not up to the quality and description offered by defendant and upon which the price was based, and that the cotton delivered was not in accordance with the contracts of sale, whereupon such claims, disputes and controversies were duly and regularly submitted to arbitration under and in accordance with the rules of the Bremen Cotton Exchange, the final result of such arbitrations being that awards or allowances aggregating the sum of, to-wit, 312,749.30 German marks, equivalent to about $74,820.52 were made in favor of said purchasers on their claims against defendant.

V.

That the particular sales in which such disputes arose and such arbitrations were had, and also the details and result of each arbitration are shown in the list hereto attached, marked "Exhibit A," and made a part hereof. In said list the first column entitled
5 "Sale Date," shows the dates of the respective contracts of sale of cotton involved in this suit; the second column, entitled "Buyers," shows the names of the respective purchasers of said cotton; the third column, entitled "Arbitration date," "Lot Number," shows the dates of the respective arbitrations and the lot numbers the cotton had in the arbitration proceedings; the fourth column, entitled "Ship, Mark and Bales," shows the names of the respective ships that carried the cotton to Bremen and the marks borne by the bales and the number of bales in the respective lots; the fifth column, entitled "Grade and Staple," shows the quality of the cotton as represented and sold by defendant and guaranteed to the buyers by the plaintiff herein (for instance, the letters and figures appearing first in said column,to-wit, "fgm. G. C., 30 m/m." mean that the cotton was sold and guaranteed as fully good middling, good color, and 30 millimeter staple); and the sixth column, entitled "Arbitr. Award," shows the respective awards made by the arbitrators (called classers) in favor of the buyers and against the seller on account of the cotton delivered being inferior in quality to the cotton sold, said awards

being expressed as so many pfennigs per ½ Kilo. That a German Pfennig is the one-hundredth part of a mark, which latter is the German monetary standard and is equivalent to the sum of, to-wit, 24 cents in American money. That a Kilo, is equivalent to 2.2 lbs. in American weight measure.

VI.

That in some of said arbitrations appeals were taken to the appeal committee, as provided by the rules of the Bremen Cotton Exchange, whereupon such appeals were duly and regularly decided
6 and the results duly certified. The details and particulars of such appeal arbitrations are shown by the list hereto attached, marked "Exhibit B," and made a part hereof. Said list consists of five columns showing respectively:

(1) The dates of appeal and the lot numbers of the cotton,

(2) The ships that transported the cotton and the marks of the cotton and the number of bales in the lot,

(3) The party appealing in each instance, whether buyer or seller's Controller,

(4) The awards of the classers below, expressed in pfennigs per ½ Kilo., and

(5) The appeal awards expressed in the same way.

VII.

That the rules of the Bremen Cotton Exchange in force at the time of the transactions involved in this suit were contained in a printed pamphlet which had been widely distributed among cotton dealers and exporters, and the defendant herein was in possession of a copy of said pamphlet and was or should have been familiar with said rules. That such of said printed rules as are material to this suit are the following, to-wit: the introductory paragraph; rules 1-2 inclusive; rules 18-30 inclusive; rule 17 because of reference in rule 29; rules 40-42; rule 46; rule 58; rule 88; rule 97; rule 100; and the form of contract contained in said pamphlet for use in sales of North American cotton on cost and freight terms. That a copy of the aforesaid rules alleged to be material herein is hereto attached marked "Exhibit C," and made a part of this petition.

7 VIII.

That at the time of the sales and arbitrations involved in this suit it was a well known custom and usage of the Bremen Cotton market for the arbitrators to measure and arrive at the money allowances to be made by them on account of deficiency in staple by using the weekly reports issued officially by the Bremen Cotton Exchange, each of which weekly reports reflected and summarized the actual state of the Bremen cotton market during the week in question as to the comparative prices paid for different lengths of cotton. That

the staple differences used in arbitrating on the cotton concerned in this suit were the differences that existed and ruled on the Bremen market on the respective dates of the several contracts of sale of The Birge-Forbes cotton, as shown by said weekly reports issued and published by the Bremen Cotton Exchange; and the amounts of money allowed against the defendant herein on account of deficiency in staple were arrived at by a faithful and correct application of said differences.

IX.

That in such arbitration proceedings defendant was represented by Edward T. Robertson & Son, Controllers selected by defendant, which said Controllers, having the advice and assistance of plaintiff whenever they asked for it, did all they could in defendant's behalf and obtained for it the best results that were in their power or that were practicable. That said arbitration proceedings were in all respects regular, and the awards or allowances aforesaid were made in good faith. That defendant was duly, legally, promptly, and within the time prescribed by the rules and customs of the Bremen Cotton Exchange, notified of such arbitration proceedings and
8 of the results of same upon their termination.

X.

That upon the final termination of said arbitrations, plaintiff, by virtue of his aforesaid contract and arrangement with defendant and under the rules of said Bremen Cotton Exchange, and by the terms of the written contracts delivered by him to the purchasers of the cotton, became bound and legally liable to pay at once to said purchasers the said awards or allowances made to them by the arbitrators. That shortly after the termination of said arbitrations plaintiff paid out on said awards or allowances the sum of to-wit, $36,610.96.

XI.

That on account of the matters aforesaid plaintiff brought suit against defendant in this court, said suit being No. 156 on the law docket of this court, and on, to-wit, the 23rd day of May, 1913, recovered a final judgment against defendant in said suit and in this court, sitting at Sherman, Texas, for the sum of $43,082.64 and court costs, said sum including the aforesaid $36,610.96 that had been paid by plaintiff to the buyers of the cotton by reason of said arbitrations, and including also the sum of $1730.16 for certain weight claims and other items mentioned in the pleadings in said suit, and including also interest on said sums to the date of the judgment. That said judgment has not been set aside, but is in full force and effect; and plaintiff here avers that the said judgment is a binding and conclusive adjudication of the fact that said arbitrations were valid and that the resulting awards had not been set aside,

waived, abandoned or released, but still remained in force.
9 That the fact that such awards were and are valid and binding on defendant is now res adjudicata by virtue of said suit and the issues made therein and the judgment rendered therein.

XII.

That afterwards, to-wit, on or about April 22nd, 1914, plaintiff paid to the buyers of said cotton the remaining sums due, on said awards, such remainder being the sum of, to-wit, $38,209.56. That plaintiff made such payments by executing and delivering to said buyers his negotiable promissory notes, aggregating the sum aforesaid, which notes were made due and payable on the — day of ——, 1914, and would bear interest from maturity at the rate of six per centum (6%) per annum. That on or about the — day of ——, 1914, plaintiff paid all of said notes in full in lawful money.

XIII.

That by the aforesaid contract and arrangement between plaintiff and defendant and by the custom and course of business between them and by the rules of the Bremen Cotton Exchange, and by reason of the fact that plaintiff as defendant's guarantor was compelled to and did pay the buyers of the cotton said sum of, to-wit, $38,209.56, defendant became liable and promised plaintiff to pay to him at once the said sum of $38,209.56, in order to reimburse plaintiff for the amount paid by him as aforesaid to the purchasers of the cotton. That defendant also, by reason of the facts aforesaid, became liable and promised plaintiff to pay him interest on said sum of money from the — day of ——, 1914, at the rate of six per centum (6%) per annum.

10 XIV.

That plaintiff has often demanded said money of defendant, but the latter has failed and refused and still fails and refuses to pay the same or any part thereof, to plaintiff's damage in the sum of $50,000.00.

XV.

Wherefore, defendant having already appeared and answered herein, plaintiff prays that he have judgment against defendant for his debt and damages aforesaid, with interest thereon as claimed above, and costs of suit; and that he have all other appropriate relief.

LASSITER, HARRISON & ROWLAND,
WOLFE & WOOD,
Attorneys for Plaintiff.

STATE OF TEXAS,
County of Tarrant:

Before, me the undersigned authority, on this day personally appeared R. M. Rowland, who, on oath, says that he is one of the attorneys for the plaintiff in the above entitled cause, and that he believes the statements made in the foregoing petition are true and correct.

R. M. ROWLAND.

Sworn to and subscribed before me this the 3rd day of December, A. D. 1914.

[SEAL.]

U. M. SIMON,
Notary Public, Tarrant County, Texas.

11

"EXHIBIT A."

Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. awa
9 /29	Boden & Haac	11 /29, 10 2507	Quernmore 4ROS — 100 B.	fgm.g.c. 30 m /M	6½ Pfg.
"	do	12 /8, 10 3050	Quernmore 4ANA — 100 B.	do	5½ Pfg.
9 /30	Schmiyz & Roessingh	12 /8, 10 2898	Quernmore 4ODD — 50 B. 4RAW — 50 B. 4MUD — 50 B. 4GIN — 50 B.	do	100 B. 5½ Pfg. 100 B. 5-7 /8
"	do	12 /7, 10 2899	Quernmore 5KOG — 50 B. 5MUS — 100 B. 5MAN — 50 B.	gm. g.c. 30m /m	2¾ Pfg.
10 /1	Gebruder Fritze & Company	12 /7, 10 3020	Quernmore 5HEN — 100 B	do	2¾ Pfg.
"	do	12 /7, 10 3021	Quernmore 5CIS — 100 B.	do	2¾ Pfg.
10 /1	Knoop & Fabarius	12 /30, 10 4415	Michigan 4NHG — 100 B.	fgm. g.c. 30 m /m	3¼ Pfg.
"	do	12 /30, 10 4414	Michigan 4HAS — 100 B.	do	4¼ Pfg.
10 /3	Lentz & Hitschfield	12 /27 /10 4515	Michigan 4BES — 100 B.	do	60 B. ¼ Pfg. 40 B. 2¾ Pfg.
"	do	12 /6, 10 2539	Quernmore 4NOV — 50 B.	do	3½ Pfg.
"	do	1 /14, 11 5578	Span.prince 4HID — 50 B.	do	4 Pfg.
"	do	12 /6, 10 2421	Quernmore 5SAD — 100 B.	gm. g.c. 30 m /m	4 Pfg.
"	do	12 /6, 10 2422	Quernmore 5POT — 100 B	do	4¼ Pfg.
10 /3	Knoop & Fabarius	1 /19, 11 5629	Span.Prince 4ARM — 100 B.	fgm. g. c. 30 m /m	4¼ Pfg.
"	do	12 /6, 10 2837	Quernmore 5REP — 100 B.	gm. g. c. 30 m /M	5¼ Pfg.
10 /6	Muller, Petzel & Company	12 /23, 10 4265	Imani 5SHE — 100 B.	do	4¼ Pfg.
"	do	12 /23, 10 4266	Michigan 5ARK — 100 B	do	4¾ Pfg.
"	do	12 /2, 10 2787	Quernmore 5PRI — 50 B.	do	1 B. 11 Pfg. 49 B. 6 Pfg.
"	do	12 /23, 10 4257	Michigan 5PET — 50 B.	do	5 Pfg.
"	do	1 /9, 11 5367	Span.Prince 5AUG — 100B.	do	4 B. 10 Pfg. 96 B. 4 Pfg.
10 /6	Muller Petzel & Company	12 /28 /10 4268	Michigan 5LEU — 100 B.	gm. g. c. 30 m /m	5 Pfg.
10 /10	H. Bischoff & Co.	1 /18 /10 5059	Span.Prince 4POP — 100 B.	fgm. g.c. 30 m /m	5 Pfg.
"	do	2 /4, 11 7471	Royal Prince 4INE — 100 B	do	4¼ Pfg.
"	do	2 /4, 11 7470	Royal Prince 4FPO 100 B.	do	50 B. ¼ Pfg. 50 B. 2¼ Pfg.
"	do	1 /17 /11 5055	Span.prince 4YAP — 100 B.	do	4¾ Pfg.
"	do	1 /17 /11 5057	Span.Prince 4IEK — 50 B.	do	3 Pfg.
"	do	2 /11 /11 7473	Cayo Soto 4LEK — 50 B.	do	3-⅛ Pfg.
10 /6	Knoop & Fabarius	12 /30 /10 4416	Michigan 4WAS — 100 B	do	2¾ Pfg.
"	do	1 /14 /11 5630	Span.Prince 4TNA — 100 B	do	4 Pfg.

Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. award
10/6	H. Bischoff & Company	12/23/10 4092	Michigan 5STY — 100 B.	gm. g.c. 30 m/m	4¼ Pfg.
"	do	12/23/10 4090	Michigan 5LEA — 100 B	do	4½ Pfg.
"	do	12/29/10 4091	Michigan 5KET — 100 B	do	3¼ Pfg.
"	do	12/29/10 4089	Michigan 5SHO — 100 B	do	5¼ Pfg.
"	do	1/18/11 5219	Span.Prince 5KIT — 100 B.	do	5 Pfg.
10/6	Boden & Haac	12/22/10 4405	Michigan 4CHI — 100 B	fgm. g.c. 30 m/m	3¼ Pfg.
"	do	12/30/10 4406	Michigan 4GAM — 100 B.	do	3½ Pfg.
"	do	1/5/11 5216	Span.Prince 4SAN — 50 B	do	4 Pfg.
"	do	1/6/11 5214	Span.Prince 4CAF — 50 B	do	5 Pfg
10/7	Gerbruder Fritze & Co	1/10/11 5438	Span.Prince 5TOE — 100 B.	gm. g.c. 30 m/m	5¼ Pfg.
"	do	1/14/11 5439	Michigan Span.prince 5ZON — 100 B.	do	4¾ Pfg.
10/7	H. Bischoff & Company	12/23/10 4087	Michigan 5TIK — 100 B	do	50 B. 6¼ Pfg. 50 B 6⅝ Pfg.
"	do	12/27/10 4085—	Michigan 5JAK — 100 B.	do	5 Pfg.
10/7	H. Bischoff & Company	1/19/11 5140	Span.Prince 5CAM — 50 B.	gm. g.c. 30 m/m	4½ Pfg.
"	do	1/19/11 5137	Span.Prince 5LAM — 50 B	do	5¼ Pfg.
10/7	McFadden Bros. & Co. G,m.b.H.	12/18/10 3883	Michigan 4EZO — 50 B	fgm. g.c.	5½ Pfg.
"	do	12/20/10 3884	Michigan 4ANY — 100 B	do	6 Pfg.
"	do	1/6/11 4644	Span.Prince 4GOO — 100 B	do	3 Pfg.
"	do	2/2/11 7263	Cayo Soto 4OFA — 50 B	do	3 Pfg.
10/8	Bishoff & Co.	12/30/10 4086	Michigan 4APE — 50 B	do	4⅜ Pfg.
"	do	1/17/11 5139	Span.Prince 4HUM — 100 B	do	4¾ Pfg.
"	do	2/10/11 7473	Cayo Stot 4ODE — 50 B	do	5⅝ Pfg.
10/8	Lenz & Hirschfeld	1/3/11 4746	Imani 4DAY — 100 B	do	6⅝ Pfg.
"	do	1/11/11 5579	Span.Prince 5TGO — 100 B	gm. g.c. 39 m/m	4½ Pfg.
10/8	Lesser & Co.	1/6/11 5142	Span.Prince 5TRA — 100 B	do	5 Pfg.
10/8	Gebruder Fritze & Company	1/10/11 5437	Span.Prince 5COO — 100 B	do	5¼ Pfg.
"	do	1/14/11 5441	Michigan Span.Prince 4WAX — 100 B.	fgm. g.c. 30 m/m	4 Pfg.
10/8	Bischoff & Co.	1/19/11 5138	Span.Prince 5MAP — 100 B.	gm. g.c. 30 m/m	50 B 5 Pfg. 50 B 5⅜ Pfg.
10/10	Boden & Haac	1/5/11 5128	Span.Prince 5HEL — 50 B	do	25 B. 5 Pfg. 25 B 5⅜ Pfg.
"	do	1/5/11 5130	Span.Prince 5GBC — 50 B.	do	5 Pfg.
"	do	1/5/11 5215	Span.Prince 5TEX — 100 B.	do	4 Pg.

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Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. award
"	do	1/5/11 5129	Span. Prince 5LOB — 100 B	do	5⅝ Pfg.
"	do	1/16/11 6228	Iami 5OHU — 100 B	do	5¼ Pfg.
"	do	2/9/11 7485	Royal Prince 5WET — 100 B	do	4⅜ Pfg.
10/11	Schmitz & Roessigh	2/23/11 7500	Royal Prince Andoni 5EEE — 100 B	do	4⅝ Pfg
10/11	Schmitz & Roessingh	2/4/11 7501	Cayo Soto 5TMT — 100 B. 5STN — 100 B.	gm.g.c. 30 m/m	5 Pfg.
"	do	1/10/11 5085	Span.Prince 5TAF — 50 B. 5NAR — 100 B. 5NOC — 50 B.	do	5½ Pfg.
10/12	McFadden Bros. & Co. G.m.b.H.	1/16/11 4642	Span.Prince 4SDU — 50 B.	fgm. g.c. 30 m/M	25 B. 5 Pfg. 25 B. 5⅜ Pfg.
"	do	2/4/11 7264	Cayo Soto 4YHR — 50 B.	do	30 B. 1½ Pfg. 20 B. 1⅝ Pfg.
"	do	2/24/11 8899	Irishman 4UDV — 50 B	do	5¼ Pfg.
"	do	1/9/11 4643	Span. Prince 4TDE — 50 B.	do	25 B. 5⅜ Pfg. 25 B. 5½ Pfg.
"	do	12/29/10 4641	Iami 5AUL — 100 B.	gm. g.c. 30 m/m	6 Pfg.
"	do	1/5/11 4635	Span. Prince 5PAP — 100 B.	do	5¼ Prg.
"	do	1/3/11 4640	Michigan Span.Prince 5BRE — 100 B.	do	5 Pfg.
"	do	1/9/11 4637	Span.Prince 5LIV — 100 B.	do	50 B. 4 Pfg. 50 B. 4¾ Pfg.
"	do	1/9/11 4636	Span. Prince 5GAD — 100 B.	do	5 Pfg.
10/13	Gebrudder-Fritze & Company	2/4/11 7521	Cayo Sota 5FRU — 100 B.	do	99 B. 3¾ Pfg. 1 B. 13½ Pfg.
"	do	2/4/11 7522	Cayo Soto 5IZA — 100 B.	do	4⅝ Pfg.
10/13	Addix & Will	1/14/11 5742	Span. Prince 5KIL — 50 B.	do	3¾ Pfg.
"	do	2/2/11 7425	Royal Prince 5MOG — 50 B.	do	4 Pfg.
10/13	Addex & Cordes	12/31/10 4629	Michigan 5ATE — 50 B.	do	4 Pfg.
"	do	1/5/11 5120	Iami 5BAM — 100 B.	do	5¼ Pfg.
"	do	2/16/11 8425	Cayo Soto 5FRO — 50 B.	do	4 Pfg.
10/14	McFadden Bros. &Co. G.m.b.H.	12/30/10 4646	Iami 40QB — 50 B.	fgm.g.c. 30 m/m	4⅝ Pfg.
"	do	12/30/10 4645	Newton Hall 4KMF — 50 B.	do	4⅜ Pfg.
10/14	McFadden Bros. & Co.G.m.b.H.	1/28/11 6056	Inkula 4ZBQ — 50 B	fgm.g.c. 30 m/m	4 Pfg.
"	do	2/3/11 6058	Inkula 4FIJ — 50 B	do	4⅜ Pfg.
"	do	2/3/11 6055	Inkula 4ORA — 100 B	do	5⅝ Pfg.
"	do	2/3/11 6057	Inkula 4EGL — 50 B	do	4-⅜ Pfg.
"	do	2/4/11 7265	Cayo Soto 4TAC — 50 B	do	6½ Pfg.

14

Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. award
"	do	2/4/11 7266	Royal Prince 4UNO — 50 B.	do	3 Pfg.
"	do	2/4/11 7267	Royal Prince 4RPG — 50 B.	do	3¾ Pfg.
10/14	C. H. Hoffman & Company, respect Gebrudder & Fritze & Co.	12/23/10 4236	Michigan 5HEW — 100 B.	gm. g.c. 30 M/m	50 B 6¼ Pfg. 50 B 6⅝ Pfg.
"	do	12/23/10 4237	Michigan 5RIG — 100 B.	do	5¼ Pfg.
"	do	1/10/11 5436	Span. Prince 5NUF — 100 B.	do	4¾ Pfg.
10/14	C.H.H. & Co. respect Sprunt & Son	12/23/10 4180	Michigan 5ESA — 100 5ASH — 100 B.	do	4¼ Pfg.
"	do	1/5/11 4556	Span. Prince 5OAR — 100 B.	do	4 Pfg.
10/14	C.H.H. & Co. resp. Addix & Will	12/27/10 4597	Michigan 5Nik — 100 B.	do	50 b. 5½ Pfg. 50 B 5⅞ Pfg.
"	do	1/13/11 5740	Span. Prince 5NIX — 100 B.	do	50 B. 3½ Pfg. 50 B. 3¾ Pfg.
10/14	Addix & Will	1/11/11 5741	Span. Prince 5MTY — 50 B.	do	5¾ Pfg.
"	do	2/4/11 7635	Cayo Soto 5SEX — 50 B.	do	3 pfg.
10/19	S.L. Cohn & Sohn	1/28/11 6288	Inkula 4XAZ — 50 B.	fgm.g.c. 30 m/m	5⅞ Pfg.
"	do	2/9/11 7478	Hannover 4BEM — 50 B.	do	2¾ Pfg.
"	do	1/13/11 5555	Span Prince 5MXD — 100 B.	gm.g.c. 30 m/m	5 Pfg.
"	do	2/21/11 8667	Cayo Soto Irishman 5RAZ — 100 B.	do	6 Pfg.
10/19	Gebruder Fritze A Company	1/10/11 5440	Span. Prince 5SCW — 100 B.	gm.g.c. 30 m/m	6¼ Pfg.
"	do	2/4/11 7523	Cayo Soto 5WFT — 50 B.	do	4¼ Pfg.
"	do	2/4/11 7526	Cayo Soto 5SBY — 50 B	do	25 B. 4¾ Pfg. 25 B. 5⅛ Pfg.
"	do	2/4/11 7524	Cayo Soto 5VEU — 100 B.	do	3½ Pfg.
10/19	Knoop & Fabarius	2/11 6840	Inkula 4MRU — 100 B.	fgm.g.c. 30 m/m	5½ Pfg.
"	do	2/2/11 6841	Tiberius 4NRA — 50 B.	do	4¼ Pfg.
"	do	4/10/11 12600	Inkula 4XCT — 50 B.	do	5 B. 5 Pfg. 45 B. 4 Pfg.
10/27	C.H.H. & Co. resp. H. Bischoff & Co.	1/18/11 5056	Span. Prince 5ONC — 100 B.	gm.g.c. 30 m/m	6¼ Pfg.
"	do	2/4/11 7468	Royal Prince 5TBD — 100 B	do	4¾ Pfg.
"	do	2/4/11 7469	Andoni 5UPQ — 50 B.	do	6 Pfg.
"	do	2/7/11 7467	Royal Prince 5QOF — 50 B.	do	25 B. 4¾ Pfg. 25 B. 5⅛ Pfg.
10/31	F. Dorfel, Prag	2/4/11 7390	Inkula 5ACP — 100 B	do	50 B. 5½ Pfg. 50 B. 4¾ Pfg.
"	do	2/15/11 7588	Cayo Soto 6Fir — 100 B.	fm. G. C. 30 m/m	4 Pfg.
10/31	Alex. Sprunt & Son	1/5/11 4554	Span. Prince 6PAN — 100 B.	do	4½ Pfg.
"	do	1/5/11 4555	Iami 5Pra — 50 B.	gm.g.c 30 m/m	5½ Pfg.

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15

Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. award
"	do	2/1/11 7159	Royal Prince 5IHO — 100 B.	do	4⅝ Pfg.
"	do	2/2/11 7160	Cayo Soto 5USJ — 50 B. 5DBJ — 100 B. 5OMD — 100 B.	do	3¼ Pfg.
0/31	Boden Haac	1/16/11 6229	Newton Hall 5JLG — 99 B.	do	3 Pfg.
"	do	1/30/11 6842	Imani-Inkula 5IKH — 100 B.	do	3⅜ Pfg.
"	do	3/10/11 10344	Imani-Inkula Newton Hall 5DMF — 99 B.	do	90 B. 4 Pfg. 9 B. 5 Pfg.
1/1	C.H.H. & Co. resp. Addix & Cordes	2/14/11 8427	Cayo Soto 6TCX — 100 B.	fm.g.c. 30 m/m	3½ Pfg.
"	do	2/21/11 8975	Iceland 6GEM — 50 B.	do	2½ Pfg.
1/1	C.H.H. & Co., resp. Muller & Petzel Co.	2/2/11 7381	Cayo Soto 6CAI — 100 B.	do	3¾ Pfg.
1/2	Gebruder Fritze & Co.	1/1/11 5435	Sapn Prince 6SEV — 100 B.	do	5¼ Pfg.
"	do	1/30/11 6950	Inkula 6QSR — 50 B.	do	30 B. 5¼ Pfg. 20 B 5⅝ Pfg.
"	do	1/30/11 6951	Inkula 6BDO — 50 B.	do	5¼ Pfg.
"	do	2/20/11 8948	Frankfurt 6CGL — 50 B.	do	4 Pfg.
"	do	3/3/11 9949	Irishman 6PNE — 50 B.	do	5 Pfg.
1/2	S.L. Cohn & Sohn	1/3/11 4798	Imani Newton Hall 5VXW — 100 B	gm.g.c. 30 m/m	50 B 6 Pfg. 50 B. 6¾ Pfg.
"	do	1/3/11 4797	Imani 5UXW — 50 B.	do	4¾ Pfg.
"	do	1/28/11 6290	Inkula 5YAZ — 50 B	do	4¼ Pfg.
1/3	do	3/31/11 6293	Inkula 5LQA — 100 B	do	5¾ Pfg.
"	do	1/30/11 6294	Inkula 6BGL — 100 B.	fm.g.c. 30 m/m	5 Pfg.
"	do	1/30/11 6291	Inkula 6VZO — 100 B.	do	5¼ Pfg.
"	do	2/21/11 8068	Inkum 6TXY — 100 B	do	4¾ Pfg.
1/4	C.H.H. & CO. Resp S.L.Cohn & Sohn	2/4/11 6289	Inkula 5DGL — 100 B.	gm.g.c. 30 m/m.	50 B. 5 Pfg. 48 B. 5¾ Pfg. 3 B. 12 Pfg.
"	do	2/4/11 6292	Inkula 5OTW — 100 B.	do	5¼ Pfg.
1/4	C.H.H. & Co.,resp. Addix & Cordes	1/4/11 5121	Newton Hall 6WYX — 52 B.	fm.g.c. 30 m/m	3 Pfg.
"	do	1/30/11 7250	Inkula 6WYX — 48 B.	do	4 Pfg.
"	do	1/31/11 7255	Inkula 6XZY — 100 B.	do	5¼ Pfg.
1/4	C.H.H. & Co., resp. Addix & Will	2/3/11 7165	Inkula 6RVW — 48 B.	fm.g.c. 30 m/m	28 B. 4 Pfg. 20 B 4½ Pfg.
"	do	2/27/11 9423-9423	Inkum 6RVW — 47 B. 6AFM — 100 B.	do	2½ Pfg.
1/8	H.Bischoff & Co	1/2/11 4485	Imani 6TWV — 100 B.	do	60 B. 4 Pfg. 40 B. 4½ Pfg.
"	do	1/30/11 7108	Inkula 6ZCP — 99 B.	do	3¾ Pfg.

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16

Sale date 1910	Buyers	Arb. Date Lot number	Ship Mark & Bales	Grade & Staple	Arbitr. award
"	do	1/30/11 7110	Inkula 6LPC — 100 B.	do	3¾ Pfg.
"	do	1/30/11 7109	Inkula 6KOD — 100 B.	do	4¼ Pfg.
"	do	1/31/11 7111	Inkula 5PSR — 99 B.	gm.g.c. 30 m/m	4¼ Pfg.
"	do	2/7/11 7474	Inkula-Dalton 5NQB — 100 B.	do	4¼ Pfg.
11/11	C.H.H. & Co. resp. Gebruder Fritze & Co.	1/31/11 6949	Augustus—Cassel 5WZY — 100 B.	do	5¾ Pfg.
"	do	2/24/11 8047	Tiberius 5VYX — 98 B.	do	4½ Pfg.
"	do	2/21/11 8949	Inkula-Inkum 5JNE — 100 B	do	3¼ Pfg.
11/17	Ed.Meyer & Co.	4/7/11 12637	Inkula-Inkum Crown of Castile 5KPB — 100 B. 5JOC — 100 B.	do	188 B. 3⅞ Pfg. 12 B. 4⅛ Pfg.
11/17	C. A. Cruner & Co.	2/2/11 7391	Inkula 5BHM — 50 B.	do	30 B. 2¾ Pfg. 20 B. 3¼ Pfg.
"	do	2/2/11 7393	Inkula 5UAV — 50 B.	do	3¾ Pfg.
"	do	2/4/11 7392	Inkula 5RXS — 50 B.	do	25 B. 5¼ Pfg. 25 B. 5⅝ Pfg.
"	do	3/8/11 10284	Inkum 5EKJ — 50 B.	do	4¾ Pfg.
"	do	3/9/11 10283	Inkum 5NTO — 100 B.	do	93 B. 5⅞ Pfg. 7 B. 6⅛ Pfg.

"EXHIBIT B."

Statement of appeal awards.

Shippers—Birge-Forbes Company, Sherman, Texas

Season 1910-11.

Appeal date lot number	Ships Marks & Bales	Appealed by	Arbitr. award		Appeal award
12/9/10 2908	Quernmore 4VWX — 50 B.	Buyers	2¼ Pfg.		3 Pfg.
12/10/10 2904	Quernmore 4GET — 100 B.	Robertson	3¼ Pfg.	75 B. 25 B.	pass 3¼ Pfg.
12/9/10 2907	Quernmore 5ACT — 50 B.	buyers	1¾ Pfg.		2¾ Pfg.
12/9/10 2906	Quernmore 5MEX — 50 B.	"	2 Pfg.		3¼ Pfg.
12/9/10 2905	Quernmore 5BID — 50 B.	"	1⅝ Pfg.		confirmed
11/28/10 1929	Hannover 4RAM — 50 B.	Robertson	5½ Pfg.		6¼ Pfg.
12/13/10 3020	Quernmore 5HEN — 100 B.	Buyers	2¾ Pfg.		4 Pfg.
12/13/10 3021	Quernmore 5CIS — 100 B.	Buyers	2¾ Pfg.		4¼ Pfg.
12/29/10 4515	Michigan 4BES — 100	Buyers 60 B. " 40 B.	¼ Pfg. 2¾ Pfg.	75 B. 25 B.	⅜ Pfg. 3¼ Pfg.

17

Appeal date lot number	Ships Marks & Bales	Appealed by	Arbitr. award		Appeal award
2/9/11 7470	Royal Prince 4PRO — 100 B	Buyers 50 B	¼ Pfg.	30 B.	¼ Pfg.
		50 B.	2¼ Pfg.	70 B.	4¼ Pfg.
2/17/11 7472	Cayo Soto 4LEX—100 B.	Buyers	3⅛ Pfg.	25 B.	pass
				25 B.	2¾ Pfg.
12/30/10 4405	Michigan 4CIII — 100 B.	Buyers	3¼ Pfg.		3 Pfg.
1/9/11 4746	Imani 4DAY — 100 B.	Robertson	6⅝ Pfg.		confirmed
2/8/11 7521	Cayo Soto 5FRU — 100 B.	Buyers 99 B	3¾ Pfg.	99 B.	6¼ Pfg.
		1 B.	13½ Pfg.	1 B.	16 Pfg.
1/5/11 4646	Imani 4OQB — 50 B.	Buyers	4⅜ Pfg.		confirmed
12/29/10 4237	Michigan 5RIG — 100 B.	Robertson	5¼ Pfg.		4¼ Pfg.
12/28/10 4130	Michigan 5ESA — 100 B. 5ASH — 100 B.	Buyers	4¼ Pfg.		4¼ Pfg.
2/8/11 7605	Cayo Soto 5SEX — 50 B.	Buyers	3 Pfg.		3¾ Pfg.
2/8/11 7523	Cayo Soto 5WFT — 50 B.	Buyers	1¼ Pfg.		5 Pfg.
2/8/11 7525	Cayo Soto 5SBY — 50 B.	Buyers 25 B.	4¾ Pfg.		confirmed
		25 B.	5⅛ Pfg.		
2/9/11 7468	Royal Prince 5TBD — 100 B.	Buyers	4⅜ Pfg.		5⅝ Pfg.
2/21/11 7588	Cayo Soto 6FIR — 100 B.	Buyers	4 Pfg.		5⅛ Pfg.
2/4/11 7159	Royal Prince 5THO — 100 B.	Buyers	4¾ Pfg.		confirmed
2/6/11 7160	Cayo Soto 5USJ — 50 B. 5DBJ — 100 B. 5 OMD — 100 B.	Buyers	3¼ Pfg.	5USJ	4½ Pfg.
				5DBJ	4½ Pfg.
				5OMD	6¼ Pfg.
2/18/11 8427	Cayo Soto 6TCX — 100 B.	Buyers	3½ Pfg.		4⅛ Pfg.
2/21/11 8426	Cayo Soto 6ULM — 50 B.	Buyers	3¾ Pfg.		4¾ Pfg.
1/7/11 4797	Imani UXW — 50 B.	Buyers	4¾ Pfg.		4 Pfg.
1/10/11 5121	Newton Hall 6WYX — 52 B.	Buyers	2 Pfg.		confirmed
3/4/11 9422-23	Inkum 6RVW—47 B. 6AFM — 100 B.	Buyers	2½ Pfg.		3¼ Pfg.
1/7/11 4485	Imani 6TWV — 100 B.	Robertson 60 B.	4 Pfg.		5 Pfg.
		40 B.	4½ Pfg.		
2/11/11 7474	Inkula-Dalton 5NQB — 100 B.	Buyers	4¼ Pfg.		confirmed
2/7/11 7391	Inkula 5BHM — 50	Buyers 30 B.	2¾ Pfg.	30 B.	4⅛ Pfg.
		20 B.	3¼ Pfg.	20 B.	5 Pfg.
3/14/11 10284	Inkum 5EKI — 50 B.	Buyers	4⅜ Pfg.		5⅛ Pfg.

18 EXHIBIT C.

The Introduction to the Rules of the Bremen Cotton Exchange.

The following rules shall apply to all business which shall be transacted, subject to the Rules of the Bremen Cotton Exchange; or with the clause "Bremen class and arbitration;" or with the clause "Bremen arbitration;" or with any other similar clause, and are binding on sellers, buyers, and all others concerned, especially brokers, agents, guarantors, etc., unless specially agreed otherwise.

Rule No. 1.

All communications, applications, appeals, etc., intended for the Board of the Bremen Cotton Exchange, shall be directed in writing to the Business-Manager.

Rule No. 2.

If a party to a contract be non-resident in Bremen, but shall have named a representative; the Executive of the Bremen Cotton Exchange, and the opposing party, shall serve all communications, declarations, notices, etc., on such representative; who shall have the right, and be bound to perform for such party, all necessary acts required by the Rules.

All acts performed agreeably to the foregoing Rule, are valid in law for the party represented.

Rule No. 18.

The buyer may claim arbitration, on the out-turn of a lot of Cotton, if he give notice to the seller, and at the same time, notify the Cotton Sample Room, within four weeks after having received the Cotton; or in case of Cotton bought, cost and freight terms, within four weeks, from the last day of landing of the cargo; and,
19 if the jointly drawn samples, have been sent to the Cotton Sample Room, conformably to Rule 40.

Rule No. 19.

The Classing, and Arbitrations on Quality, shall be done by the Sworn Classers of the Bremen Cotton Exchange.

The names of the parties and the marks of the Cotton, shall not be disclosed to the Classers until they have completed their award.

Rule No. 20.

The Standards used in classing, etc., shall be based on the Standards of the Liverpool Cotton Association Limited.

Standards of such descriptions of Cotton, for which London is the chief market, may be made according to London; and of such descriptions, of which it is impossible to obtain copies of official Standards, either in Liverpool or London; Bremen Standards may be made independently.

The Reserve-Standards shall be in the custody of the Manager.

The Working-Standards shall be compared, as often as necessary, and shall be fixed by the Standard Committee, at least once a year.

Rule No. 21.

North American Cotton shall be classed in quarter grades only.

Allowances, and the differences between the grades, shall be fixed according to the Bremen market value, but, if such cannot be fixed exactly, the allowances, etc., shall be based respectively, on the market value in Liverpool or London.

In fixing market values, the value of "spot" sales, shall be determined by the day of sale; of cotton sold to arrive, or to be
20 delivered on a day named; by the day of tender; and of Cotton sold cost and freight terms; by the last day of landing of the cargo.

Rule No. 22.

It shall always be understood, that North American Cotton shall grade "even running," unless "average" has been expressly stipulated. Even running lots, may contain variations in grade to ½ grade above, and to ½ grade below, the grade named; bales above, compensating for bales below.

Better grade shall not compensate for deficiency in staple, when a greater length of staple than 28 m/m has been contracted for.

When East Indian Cotton is sold to be a specified grade, such grade shall refer to lots, and not to single bales.

When North American Cotton is sold, equal to American drawn samples of the identical lot; ¼ grade shall be allowed for Bloom at arbitration.

Rule No. 23.

The Arbitrations, and Classing shall be done, on One Set of Samples, drawn jointly by buyer and seller, which shall be sent, in a properly sealed condition, to the Cotton Sample Room.

The note of instructions accompanying such samples shall state:

(1) owner of samples,

(2) if the samples are only to be classed or,

(3) if to be arbitrated; on what conditions.

The samples shall be dressed by the Cotton Sample Room.

21 Rule No. 24.

The Certificates of classification, or arbitration, issued by the Cotton Sample Room, shall be in duplicate.

The certificates shall bear the date of issue, and be signed by the Classers; one shall be handed, by the Cotton Sample Room, on the day of issue, to the party demanding arbitration, and the other to the opposing party, if named.

If the opposing party has not been named, both certificates shall be handed to the party demanding arbitration, who shall himself hand on one to the opposing party, if resident, or represented in Bremen; not later than twelve o'clock noon, on the next business day after the day of issue. Should the opposing party, or both parties, be neither resident, nor represented in Bremen; the party demanding arbitration shall, upon the receipt of the certificates, pass on one without delay. If the party is unable to deliver the certificate, in time for the opposing party to avail himself of the right of appeal, as provided in Rule 26, he shall inform the opposing party of the award by telegraph. In case the party demanding arbitration, neglect to fulfill the duties incumbent on him, he shall lose the right to enforce the award of the classers.

Rule No. 25.

The fees, for arbitration and classing, shall be charged, according to a tariff, and be collected by the Cotton Sample Room.

The fees shall be borne by the buyer, on such lots as pass in arbitration, or on appeal; or, when the allowance is so small, as not to exceed the sum of the fees; but by the seller, when the allowance exceeds the sum of the fees.

22 The arbitration fees for Cotton sold "basis," or with "mutual allowances"; shall be paid jointly by the parties.

If, in consequence of incorrect instructions, re-arbitration, or reclassing be required; the fees shall be borne by the party at fault.

Rule No. 26.

The parties may appeal to the Board against the award of the classers, provided the appellant give written notice to the Manager within 3 busine s days, after the date of the certificate, and simultaneously written notice to the opposing party.

The Management shall immediately inform the Committee for the Selection of Arbitrators, of such appeal; who shall appoint three experts, Members of the Bremen Cotton Exchange, as an Appeal Committee; and shall also nominate one of the Classers, who took part in the award in dispute, to attend the meeting of the Appeal Committee, as advisory Member.

Rule No. 27.

The award of the Classers shall be placed before the Appeal Committee, but they shall not be informed, whether buyer or seller appeal. The names of the parties, or the marks of the Cotton, shall not be disclosed to them, until they have completed their award.

Rule No. 28.

The appeal fees shall be charged according to the tariff. They shall be borne by the appellant when the award is confirmed; and when an alteration is made, each party shall pay one-half. The fees shall be collected by the Manager, three-fourths being
23 assigned to the Appeal Committee, and one-fourth to the Bremen Cotton Exchange.

Rule No. 29.

Rules 16 and 17, referring to the withdrawal of appeals, and the validity of awards, apply equally to appeals on Quality.

Rule No. 30.

The Classers, or the Appeal Committees, may order fresh samples to be drawn, if they deem it necessary, and it be practicable.

Rule No. 17.

The decisions of the Arbitrators, and Appeal Committees, are final and binding, and any appeal to Courts of Law are excluded.

Rule No. 40.

The buyer, or the seller, may demand that samples be drawn jointly, at the time of receiving; and each party shall pay his own costs.

The jointly drawn samples, shall be properly sealed, and sent, by the buyer, to the Cotton Sample Room, within four weeks from the last day of receiving the Cotton; in case of Cotton bought, cost and freight terms; within four weeks from the last day of landing of the cargo.

Rule No. 42.

The seller shall be responsible for the correctness of the samples, in cases where the samples have not been drawn jointly with the buyer.

Rule No. 46.

Unless it has been expressly agreed, that tinged, high-coloured, or stained, North American Cotton, may be delivered; the buyer
24 is only bound to receive such Cotton, with an allowance according to the market value; and the seller shall further pay the buyer a penalty of 1 Pfennig per ½ Kilo on high-coloured, or stained Cotton; small quantities (about 5 per cent) shall not be considered.

Rule No. 58.

North American Cotton sold on sample, or to be a specified grade, shall, in case of inferiority, be taken by the buyer with an allowance according to the market value, but the seller shall pay the buyer a penalty of 1 Pfennig per ½ Kilo upon all bales falling more than half a grade below the selling sample, or specified grade; (small quantities, about 5%, not to be considered).

On the other hand, should the allowance amount to the value of a whole grade, or more, calculated on the average of the whole lot; the buyer shall have the option of taking the cotton with the allowance resulting, according to the above rule; with the addition of a penalty of 2 Pfennig per ½ Kilo; or, of refusing to accept the cotton, and regulating the contract in accordance with rule 38.

Rule No. 88.

All Sales of Cotton on "cost and freight terms," shall be subject to Rules 1-48, 71, 73, 79 and 89-100.

Rule No. 97.

North American Cotton sold on sample, or to be a specified grade, shall in case of inferiority, be taken by the buyer, with an allowance according to the market value, but the seller shall pay the buyer, a penalty of 1 Pfennig per ½ Kilo, upon all bales falling more than half a grade below the selling sample, or specified grade
25 (small quantities, about 5%, not to be considered). On the other hand, should the allowance for grade, amount to the value of a whole grade or more, calculated on the average of the whole lot; the seller shall pay to the buyer in addition, a penalty of 2 Pfennig per ½ Kilo.

If North American Cotton is sold to average a specified grade without a clause, in case of inferiority, it shall be taken by the buyer, with an allowance according to the market value. On the other hand, should the allowance for grade, amount to the value of a whole grade or more, calculated on the average of the whole lot; the seller shall pay to the buyer in addition, a penalty of 2 Pfennig per ½ Kilo.

But if cotton is sold to average a specified grade, with a clause "nothing below," in case of inferiority, it shall be taken by the buyer, but the seller shall pay the buyer, in addition to the allowance as provided in sec. 2; a penalty of 1 Pfennig per ½ Kilo, upon all bales falling below the guarantee-clause (small quantities, about 5%, not to be considered).

Rule No. 100.

If a Guarantor has been named in the Contract, he shall be responsible to the buyer, for the immediate payment of allowances due for inferiority, in quality and weight.

Bremen Cotton Exchange.

Cost and Freight Contract for North American Cotton.

.....190

M .....
in.....

M ..... in .....
ha.....this day sold to you through the undersigned on
26 the terms of the printed Rules of the Bremen Cotton Exchange Bremen arbitration

..... Bales ..... Cotton,

Quality: .....
.....
.....
Price: a.....Pence per American pound gross weight
Cost, Freight..... to.....
less 6 per cent allowance.
To be shipped per.....
from ..... to .....
via ....
Shipment: .....

Reimbursement by M .....:..... drafts at 60 days' sight, in exchange for shipping documents, in Marks at the rate of exchange of.....
Marks per £100 or .....
upon M .....
in ....

Marine Insurance shall be provided by.....
including country damage.

(If by Seller, with 5 per cent imaginary profit added to the net invoice amount.)

Guarantee for Weight: gross landing weight guaranteed to be within 1 per cent of gross invoice weight

(100 lbs. American equal to 45,^{33} Kilo.)

Weight shall be ascertained jointly by Buyer and Seller at port of delivery.

Samples: If shipment be via Bremen, the Cotton shall be drawn jointly by Buyer and Seller at that port otherwise at place of destination.

27 Guarantor resident in Germany: M..... undertake the immediate payment of claims due for inferiority in quality and loss of weight, and for variation of weight according to Rule 96, secs. 6 and 7.

Remarks: ....
....

Yours faithfully,

.....

Printed and sold by H. M. Hauschild. Bremen, Langenstrasse 35/37.

Endorsed: No. 83 Law. Carl R. Heye, plaintiff, v. The Birge-Forbes Co., defendant. Plaintiff's first amended original petition. Filed Dec. 4, 1914. J. R. Blades, clerk U. S. Court, by M. B. Oslin, deputy.

Defendant's Second Amended Answer.

In the District Court of the United States for the Eastern District of Texas.

No. 83.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

The defendant, after obtaining leave of court, files this its second amended original answer, amending its first amended original answer filed herein May 21st, 1914, as follows:

I.

The defendant excepts to plaintiff's original petition filed herein on the 2d day of October, 1913, for the reason that the same
28 is insufficient in law and of this it prays the judgment of the court.

II.

For answer herein defendant denies each and every allegation in said petition contained and demands strict proof thereof.

III.

Further answering, the defendant avers:

(a) During the years 1910 and the early part of 1911, and for several years prior thereto, the plaintiff was the agent of the defendant in Bremen, Germany, for the purpose of selling cotton in

the Bremen market and to fully represent the defendant in such matters in said market, and in all matters growing out of such sales as he made. It was his duty as such agent to faithfully and diligently look after the matters and business of the defendant in said market, including the matter of arbitrating its cottons, in the event of arbitrations.

Edward T. Robertson & Son, residing at said place, also in a limited way, represented the defendant, it being their duty to draw the samples of any cottons to be arbitrated, such samples to be jointly drawn by the said Edward T. Robertson & Son and the buyers or their representatives, and to see that the arbitrators passed upon the identical samples so drawn by them. It was also their duty to see and certify to any awards which might be made, certifying that such awards were, in fact, made. This jointly drawing of samples, seeing that said samples were sealed and delivered to the arbitrators and identifying the awards being what is commonly known as "controlled." All other duties with respect to such arbitrations devolved upon the plaintiff. The controllers had no further
29 or other duties than those mentioned and included in those mentioned and all that were necessary to fully perform the duties mentioned. The terms of sales, the conditions of the arbitrations and the matters actually to be arbitrated, the giving of notes of instructions hereinafter referred to, all these and other duties were upon the plaintiff and were so understood by him.

(*b*) On the 21st day of August, 1908, to fully state the conditions upon which the defendant was willing to sell cotton in said market after that date, the defendant wrote the plaintiff a letter of instructions fully stating the terms and conditions on which plaintiff must sell cotton for defendant, which letter is of the tenor and effect following:

"Sherman, Texas, August 21st, 1908.

Mr. C. R. Heye, Bremen Germany.

DEAR SIRS: Replying to yours of the 3d inst., as you seem to think you will be able to do a large business for us and as our relations have always been pleasant, we will drop the question of reducing expenses by employing an agent for the present and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grade and staple shall be those in effect (the actual differences made on cif and 6 cotton sold by us) at the time of the sale instead of the last day of landing.

Yours truly,

THE BIRGE-FORBES CO."

30 (*c*) In Bremen, Germany, there is what is known as the Bremen Cotton Exchange but little or no spot cotton, by which is meant actual cotton there on the ground, is sold. Practically all the cotton sold in said market is American cotton such as

this was and by the last sentence in said letter, the plaintiff was instructed that the differences to be applied by the arbitrators must be actual differences made on cif and 6 cotton, American cotton, as distinguished from any other differences.

Said Cotton Exchange has a committee appointed for the sole purpose of preparing a statement of differences to be applied by arbitrators in controversies between Bremen buyers and American and other shippers, and particularly American shippers. The differences so adopted are published in a sheet or circular issued by said exchange. Said differences are wholly arbitrary and do not in fact exist. They are made solely for the purpose of favoring the Bremen buyer in his controversy with the American shipper. The same does really not represent the differences actually paid and made between the various grades on said market and are fictitious and void and grossly and unreasonably excessive. It was to guard against the application of these differences that said letter was written. The part in parenthesis therein was inserted to make it plain exactly what differences was meant and the plaintiff fully understood the same and thereafter, all sales were made subject to the terms of said letter and to express which there was inserted in all the defendant's copies of the contracts of sale the following special conditions, to-wit:

"Any arbitration to be based upon the same grade and staple differences in force on date of contract."

31 The word "differences" therein used meant those actual cif and 6 differences required by said letter and were so understood by all the parties.

Under said letter, plaintiff was also instructed that the date for the application of differences in grade should be the date of the contract instead of the last day of landing of cargo as was required in a sale strictly under the rules of the Bremen Cotton Exchange.

(*d*) Among the rules of the Bremen Cotton Exchange governing arbitrations is the following:

Sec. 23, Div. III:

"The arbitrations and classing shall be done on one set of samples drawn jointly by buyer and seller which shall be sent in a properly sealed condition to the Cotton Sample Room.

The note of instructions accompanying these samples shall state:

1. The owner of the samples.
2. If the samples are only to be classed or
3. If to be arbitrated, on what conditions.

The samples shall be dressed in the cotton sample room."

It was the plaintiff's duty, as defendant's agent, to see that a correct note of instructions accompanied said samples, stating truly and correctly the conditions upon which the cotton was to be arbitrated, which included a statement of the differences to be applied, and the date of the application of the differences.

(*e*) If there were any arbitrations of said cottons as claimed by the plaintiff, then the same were and are wholly void for the following reasons, to-wit:

32 1. The arbitrators did not pass on the matters actually in controversy. If said cottons delivered were not of the grade

sold, which is not admitted but is denied, then it was their duty to determine the differences made on cif and 6 cotton made on the dates of the various contracts and apply only such differences, those being the differences contemplated by the contracts. They did not apply or adopt such differences.

2. If there were any such arbitrations, the arbitrators applied other and different differences than those contemplated in said letter and those contemplated in the sales and which were within the controversy of the parties. The differences so applied were grossly excessive, being about $5.00 per bale whereas the actual cif and 6 differences were not, and would not have been exceeding about 90c. per bale, if the cotton was not up to the grade sold.

3. The awards, if the same were as alleged by the plaintiff, were grossly and unreasonably excessive. They were excessive (*a*) because no such differences actually existed between the various grades of cotton as those adopted and applied by the arbitrators and (*b*) because the cottons were practically all, if not all, of the grade actually sold. The sum of about $5.00 per bale for said cotton is grossly excessive.

4. The arbitrators were biased in favor of the Bremen buyers and prejudiced against the defendant and were wholly incompetent and incapable of acting fairly as such arbitrators. They pretended not to know who the parties were and a rule of said Exchange required that they do not know, but said rule is intended to make it appear that the arbitrators could and would be fair because they would not know who
33 the parties were, but they did know, or have every reason to know, that the parties were Bremen buyers on one side and American shippers on the other.

5. Defendant is informed and believes, and upon information and belief avers the facts to be, that there exists a conspiracy in said Bremen Cotton Exchange against this defendant and against American shippers generally. About the time of these sales, as is well known throughout the United States and in commercial and financial circles, a great number of Bremen buyers lost heavily by reason of certain forged bills of lading and certain frauds practiced by certain shippers. Large sums were so lost and defendant believes, and upon belief avers the facts to be, that there exists a fraudulent conspiracy on the part of the Bremen buyers and members of the Bremen Cotton Exchange, that, until said buyers fully recover their losses by reason of said fraudulent bills of lading, there shall be excessive allowances made in their favor in all arbitrations with American shippers regardless of whether connected with said fraud, until they have recovered a sufficient amount to make up their losses. In pursuance therewith, said arbitrators made said allowances grossly excessive, not at all deterred by the fact that this defendant had no connection whatever with said fraud.

6. Plaintiff failed, refused, or neglected to furnish any notes of instructions whatever to the arbitrators containing the terms and conditions of the arbitrations and the arbitrators did not know, and could not have known, the controversy between the parties. If any were given, which is not admitted, the plaintiff allowed the buyers

to furnish same not even seeing if same were correct, which they were not.

34 (*f*) Realizing, and admitting, that the foregoing were true, the plaintiff agreed to waive and set aside said so-called awards and to submit the matters really in controversy to another arbitration and, accordingly, on the 27th day of January, 1911, plaintiff and defendant entered into a contract which is shown in "Exhibit A" hereto attached and made a part hereof.

Both plaintiff and defendant proceeded to act under said contract, each appointing an arbitrator. Samples were drawn and submitted to the arbitrators agreed on, but almost immediately after such appointment the plaintiff began a studied and persistent effort to prevent an arbitration taking place under said contract. Very soon thereafter, he began an effort to induce the arbitrators selected by him to assume a partisan attitude, such as taken by the Bremen arbitrators. Notwithstanding he had agreed that thereafter the cotton should be arbitrated in Liverpool, he had the buyers to continue to demand Bremen arbitration and by the prejudiced Bremen arbitrators and, as soon as they pretended to arbitrate said cotton, the plaintiff would notify the Liverpool arbitrator selected by him the results of the so-called Bremen arbitration and then strenuously insist that the Liverpool arbitrators must allow him even more than the Bremen arbitrators advising very promptly the amounts so found by the prejudiced Bremen arbitrators and would and did positively direct and urgently insist on him finding not less but very much more insisting that it would be necessary for him to have greater allowances than were made in Bremen and failing in this, then he did everything within his power to prevent, and did finally prevent, the arbitrators acting. Insisting that the arbitrator appointed by him accept

35 no less than the amount and even more than the socalled Bremen arbitrations allowed him, said arbitrator would not act fearing that no such allowances, and, in fact, knowing that no such allowances could correctly be made in favor of the plaintiff, prevented said arbitration taking place.

(*g*) Plaintiff has not paid any part of said alleged awards. He alleges in his petition that he paid $38,209.56 principal and $4,967.24 interest August 1st, 1913, which defendant denies. In fact, the plaintiff has paid nothing of any value whatever. April 22nd, 1914, long after this suit was filed, he did go through the form of giving a note to certain persons, but if such persons were owners of any claims against this defendant, which is not admitted, defendant denies that the plaintiff has paid said notes, or ever expects to pay said notes and denies that said parties expect him to pay the same. If the parties in whose favor said alleged notes were given were the parties to whom he sold the cotton, which is not admitted, then it avers that plaintiff's sole purpose in giving said notes was to enable him to speculate and to enable said partners to speculate on this defendant. The plaintiff and said parties entered into said scheme for the purpose of speculating on defendant and to divide among themselves any profit or anything which this court may award in any way of recovery to the plaintiff, anything, whatever which he does recover being profit.

(*i*) Even if it were true that said transaction was intended as a payment of any demands against the defendant, which is not admitted but expressly denied, then the same was entirely voluntary on the part of the plaintiff because if said parties had any cause
36 of action whatever against the defendant, which is not admitted, the same were barred by the two years' statute of limitation when paid by plaintiff, if said scheme can be said to be a payment, more than two years having expired after the accrual of their various causes of action before the alleged payment was made.

(*j*) After plaintiff succeeded in preventing the Liverpool arbitrators acting, he filed suit in this court for the amount sued for herein and was denied a recovery, after a trial on the issues joined, recovering part of the amount sued for and a recovery being denied on other part, to-wit, the amount now sued for, said judgment is therefore a bar to any recovery herein.

(*k*) If the plaintiff has made such payment, which is not admitted but is denied, the same was made after this suit was filed and therefore his cause of action, if any he has, was not due and had not accrued when this suit was filed.

(*l*) Defendant further avers that if said sales were made subject to the Bremen arbitration as alleged by plaintiff, that said agreement is void for the reason that Section 17, paragraph II of said rules which governs said arbitration is as follows:

"The decision of the Arbitrators and Appeal Committees are final and binding and any appeal to a court of law are excluded."

The effect of said rule is to oust the court of all jurisdiction, and an agreement subject thereto is therefore void.

(*m*) Defendant denies that said former suit referred to in plaintiff's first amended petition is res adjudicata with respect to the
37 matters alleged therein. It denies that the issues tendered and presented in said petition were determined or were necessary to a determination of said former suit, and it further alleges that it believes, and on belief avers the facts to be, that the judgment in said former suit was obtained through fraud and false testimony on the part of the plaintiff in this suit. The plaintiff testified in said former suit in part as follows:

"In selling the Birge-Forbes Company cotton I made a guaranty in each sale that reclamation claims duly arbitrated would be honored. I attach hereto and mark for identification 'Exhibit Y,' a copy of the regular contract of sale, which I entered into, covering each sale of cotton that I made at Bremen. I refer particularly to the following language in it as my guaranty that the cotton would meet the terms of sale contract: 'Guarantor, resident in Bremen, undertakes the immediate payment of claims due for inferiority in quality and loss in weight and for variations in weight according to Rule 96, Secs. 6 & 7.'"

Defendant believes, and on belief avers, the fact to be that the plaintiff did not make a guaranty in each or any of the sales as he stated in said testimony, and it denies that he made such guaranty; and avers on belief that said testimony was wholly untrue and was known to be untrue by plaintiff when he so testified, but defendant

was misled thereby and did not know to the contrary until it was too late to prove the facts and defeat said recovery, and therefore avers that said judgment was void and is not binding as res adjudicata by reason of being procured by fraud and false testimony.

In said former trial the plaintiff further testified in effect that he had sent to his attorneys copies of all papers relative to said
38 sales, and if he sent to said attorneys either contracts which he made with said purchasers, or if he sent to his attorneys copies thereof, or what purported to be copies thereof, plaintiff's attorneys are hereby notified to produce the same on the trial or secondary evidence will be sued to establish the contents of the same.

(*n*) Defendant further avers that if it is true that plaintiff has made the payments alleged, which it expressly denies, he made the same voluntarily, and not because he was bound therefor as guarantor or surety of defendant. Both plaintiff, and each and all of said buyers, or persons to whom he claims he made such payments, reside in Germany, and under the laws of Germany, which defendant here pleads, each and all of said alleged claims and alleged awards were barred by limitation two years after the making of such awards, and that if the plaintiff has made such payments, as he alleges he made, the same long after the expiration of two years and at a time when the same were barred by limitation under the laws of Germany against both the plaintiff and against this defendant, and when he was under no legal obligation to make the same.

(*o*) Under the laws of Germany, which defendant pleads, plaintiff's alleged cause of action *for* no interest whatever until the suit was filed and then 4% per annum, but if not accrued then, it bore such rate of interest only after accrued by actual payment of said alleged indebtedness.

Wherefore, defendant prays that plaintiff take nothing by this suit.

J. F. HOLT,
HEAD, DILLARD, SMITH,
MAXEY & HEAD,
Attorneys for Defendant.

39 This agreement, made and entered into this the 27th day of January, 1911, at Sherman, Texas, by and between The Birge-Forbes Co., of Sherman, Texas, a corporation duly organized under the laws of Texas, hereinafter called "first party" and Carl R. Heye, a resident of Bremen, Germany, hereinafter called "second party," Witnesseth:

That whereas, first party has shipped fifteen thousand five hundred bales of cotton during the current season, and whereas first party is dissatisfied with the allowances heretofore made by the Bremen Board of Arbitration on such of this cotton as has been arbitrated, to-wit: about ten thousand bales, and,

Whereas, both parties are willing that the balance of the cotton shall be arbitrated in a different manner;

Now, therefore, it is mutually agreed, for a valuable consideration, that the first party appoint a man in Liverpool, England, as its arbitrator, and the second party appoint a man in Liverpool, England, as

his arbitrator; these two arbitrators to attempt to arbitrate the balance of the cotton not yet arbitrated; if these two arbitrators can agree, their decision is to be final; if they cannot agree they are to appoint a third arbitrator, to be agreed upon by them and his decision is to be final. Fresh samples of the cotton to be arbitrated, the said samples to be properly drawn in the presence of and under the supervision of a controller to be named by first party, are to be forwarded direct to the Liverpool arbitrators.

It is understood and agreed that the average allowances reached by the Liverpool arbitrators is to be applied as the average allowance to be paid on the cotton previously arbitrated in Bremen, Germany; that is to say, that the average amount allowed per pound on the cotton arbitrated by the Liverpool arbitrators is to be multiplied by the total number of net landing pounds shipped by first party to or through second party during the present cotton season, and the amount thus reached shall be the allowance to be paid by first party.

The allowances made by the Liverpool arbitrators are to be paid by first party immediately on receipt of each claim as allowed by them.

The differences to govern in the arbitration of this cotton are to be one sixteenth (1/16d) of a penny per pound between half grades, that is, between Fully Good Middling, and the actual differences between the various staples that the Liverpool buyers were paying first party and other American shippers on dates of sales for cif and 6% cotton.

The Liverpool arbitrators are to determine what the actual differences were that *was* actually paid by Liverpool buyers to first party and other American shippers for cif and 6% cotton on date of sale.

The cotton is to be arbitrated on the same grade and staple descriptions as sold by first party.

Witness our signatures the day and year first above written.

THE BIRGE-FORBES CO.,
By N. B. BIRGE, *Prest.*

Attest:
M. C. DORSET, *Treas.*

Second party:

CARL R. HEYE,
By C. KAUFMAN.

Witness:
A. B. SAUL.

Copy.
Exhibit A.

Endorsed: No. 83. Carl R. Heye vs. The Birge-Forbes Co. Defendant's Second Amended Answer. Filed May 20, 1916. J. R. Blades, Clerk U. S. Court. By M. B. Oslin, Deputy.

41 *Plaintiff's First Supplemental Petition.*

In the District Court of the United States for the Eastern District of Texas, At Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES CO., Defendant.

Now comes Carl R. Heye, plaintiff in the above entitled cause, and by leave of court files this his first supplemental petition, and in reply to defendant's first amended original answer filed herein, says:

I.

He demurs generally to defendant's first amended original answer and says the same is insufficient in law.

II.

Plaintiff specially excepts to said answer because the same is not verified as the law requires.

III.

Plaintiff specially excepts to subdivision 5 of Section (*e*) of paragraph IV of said answer, because the same is too vague, general and indefinite and does not state specific facts sufficient to constitute a defense to the enforcement by plaintiff of the awards in question. Plaintiff further specially excepts to all the allegations in said subdivision as to the alleged experiences of Bremen cotton men with forged and fraudulent bills of lading, because such allegations are immaterial and irrelevant in this suit and are of a prejudicial nature.

IV.

Plaintiff specially denies each and every allegation in any part of said answer that is in any way contradictory of or inconsistent with the statements made in plaintiff's first amended original petition.

42

V.

Plaintiff specially denies the allegation in section (*a*) under paragraph IV of said answer to the effect that it was plaintiff's duty as agent for the defendant to look after the matter of arbitrating the de-

fendant's cotton at Bremen. Plaintiff says on the contrary that he was not charged with any duties, or clothed with any powers, to represent defendant in the matter of arbitrations, all such matters having been entrusted by defendant to the Controllers selected and employed by it, to-wit, Edward T. Robertson & Son.

Plaintiff denies the allegation in said section (*a*) that the duty rested upon plaintiff to give to the Bremen Cotton Exchange notes of instructions in the event of arbitrations. Plaintiff says that on the contrary neither he nor defendant's Controllers were charged with any such duty, but that the notes of instructions were always given by the parties demanding arbitration, and in all cases involved in this suit the parties demanding arbitration were the buyers of the cotton. Plaintiff says in this connection that it was the business and duty of defendant's Controllers to see that the notes of instructions given by the parties demanding arbitration were correct and in accordance with the contracts of sale.

Plaintiff admits that defendant mailed to him, and that he received in due course of mail, the letter of August 21st, 1908, set out in section (*b*) of paragraph IV of defendant's said answer.

43 Plaintiff denies the statement made in section (*c*) under said paragraph IV that little or no spot cotton was sold on the Bremen market.

Plaintiff admits that the Bremen Cotton Exchange has a committee appointed for the purpose of preparing a statement of differences to be applied by arbitrators in controversies between Bremen buyers and American and other shippers as alleged in said section (*c*). Plaintiff admits that such differences are published in a sheet or circular issued by said Bremen Cotton Exchange. Plaintiff denies the allegation made in said section (*c*) that said differences are wholly arbitrary and did not in fact exist. Plaintiff says that the contrary of said allegation is true. Plaintiff denies the further allegation in said section (*c*) that such differences are made solely for the purpose of favoring the Bremen buyer in his controversy with the American shipper. He also denies the allegation in the same section to the effect that said differences did not really represent the differences actually paid and made between the various grades on the Bremen market and are fictitious and void and grossly and unreasonably excessive. Plaintiff denies the further allegation in the same section that it was for the purpose of guarding against the application of such differences that said letter of August 21st, 1908, was written. Plaintiff says that on the contrary the only meaning and purpose defendant had in writing said letter was to provide that in all future arbitrations the date for the application of the differences prevailing on the Bremen market was to be the date of the contract of sale instead of the last day of landing of the cargo. Plaintiff

44 says that both he and the defendant so construed said letter and acted upon the same.

Plaintiff admits the allegation in said section (*c*) that after the sending of said letter of August 21st, 1908, plaintiff in making all subsequent contracts with Bremen buyers inserted in such contracts this language, "any arbitration to be based upon the same grade and

staple differences in force on date of contract." Plaintiff denies the allegation that the word "differences" so used in said contracts meant the actual cif and 6 differences made in the particular sales of The Birge-Forbes Co. on the Bremen market. On the contrary plaintiff says said word meant, and was understood by plaintiff and defendant and said buyers to mean, that the usual and customary differences fixed by and known to the Bremen cotton market were to be applied in arbitrations, but that in making arbitrations the differences that existed on the respective dates of the contract of sale were to be used instead of such differences as existed on the last day of landing of the cargo.

Plaintiff admits the allegation in said section (*c*) that under said letter plaintiff was instructed that the date for the application of differences should be the date of the contract instead of the last day of landing of the cargo.

Plaintiff admits that rule 23 of the Bremen Cotton Exchange, as set out in section (*d*) of paragraph IV of defendant's said answer, was in force and effect.

Plaintiff denies the allegation that under said Rule 23 it was the plaintiff's duty, as defendant's agent, to see that a correct note of instructions accompanied the samples mentioned in said rule 23.

45 Plaintiff denies the opening sentence in section (*c*) of said paragraph IV, in which it is charged that any arbitrations of defendant's cotton at Bremen were and are wholly void. Plaintiff says that on the contrary all such arbitrations were regular, legal, valid and binding.

Plaintiff denies the allegation in subdivision (1) of said Section (*e*) that the arbitrators did not pass on the matters actually in controversy, and the further allegation that it was the duty of the arbitrators to ascertain and apply other differences than those officially ascertained and promulgated in the weekly reports of the Bremen Cotton Exchange.

Plaintiff denies the allegation in subdivision (2) of said section (*e*) that the arbitrators applied other differences than those contemplated in defendant's letter of August 21st, 1908, and in the contracts of sale made by plaintiff with the Bremen buyers. Plaintiff says that said arbitrators applied the differences as ascertained and published by the Bremen Cotton Exchange, and which reflected the true state of the Bremen market, and that neither said letter of August 21st nor said contracts of sale required or contemplated the application of any other differences. Plaintiff further denies the statement that the differences applied by the arbitrators were grossly excessive, and denies that they were in any respect excessive or incorrect. Plaintiff further denies the statement made by defendant as to the amount per bale that the differences it now contends for would have amounted to.

Plaintiff denies the statement made in subdivision (3) of said section (*e*) that the awards of the arbitrators were grossly and unreasonably excessive, denies that they were excessive at all; de-

46 nies the statement that the differences applied by the arbitrators had no actual existence, and denies that the cottons arbitrated were of or practically of the grade actually sold. Plaintiff says

that defendant's cottons proved to be in most instances greatly deficient in quality and that the allowances made for such deficiencies were correct, reasonable and just.

Plaintiff denies the allegation in subdivision (4) of said section (*e*) to the effect that the arbitrators were biased in favor of the Bremen buyers and prejudiced against the defendant, and were wholly incompetent and incapable of acting fairly as such arbitrators. Plaintiff denies the further allegation in said subdivision (4) that the rule of the Bremen Cotton Exchange referred to by defendant was intended to make it appear that the arbitrators were fair and impartial, because kept in ignorance of the identity of the parties, but that they in fact knew that the parties were Bremen buyers on one side and American shippers on the other. Plaintiff says that on the contrary many arbitrators were constantly had at Bremen in which both parties were residents of Germany and American shippers were not involved or interested, and that the rule referred to was enforced and applied in good faith and the arbitrators were fair and impartial and at the time of passing on the cotton had no knowledge of the identity or nationality of the parties to the arbitrations:

Plaintiff denies the allegation in subdivision (5) of said section (*e*) to the effect that there exists a conspiracy in the Bremen Cotton Exchange against the defendant and American shippers generally, and denies the further allegation that about the time of the sales here in controversy a great number of Bremen buyers lost heavily by reason of certain forged bills of lading and certain frauds
47 practiced by certain shippers, and denies the statement that a fraudulent conspiracy exists on the part of the Bremen buyers and members of the Bremen Cotton Exchange to recoup such losses by acting unfairly toward American shippers in cotton arbitrations and making excessive awards against American shippers, and denies the further statement that in pursuance of such alleged conspiracy the arbitrators of defendant's cotton made excessive allowances.

Plaintiff admits the statement contained in subdivision (6) of said section (*e*) to the effect that plaintiff did not furnish any notes of instructions to the arbitrators of the cotton here in controversy, containing the terms and conditions on which the arbitrations were to be had; and plaintiff says he did not do this because it was not customary or expected that he should do so, but on the contrary such notes of instructions were always furnished by the parties demanding arbitration, and the controllers for the shipper had the opportunity and right to check up such notes of instruction by the contracts of sale and satisfy themselves as to whether or not the notes of instructions were correct. Plaintiff denies the further allegation in said subdivision (6) that the arbitrators did not know what was the true issue and controversy between the parties, and that the notes of instructions furnished by the buyers were not correct. Plaintiff says that all such notes of instructions were in fact correct, and were checked up and verified by Edward T. Robertson & Son, the controllers for defendant.

Plaintiff denies the allegation in section (*f*) of said paragraph IV to the effect that the plaintiff realized and admitted that the statements made in preceding parts of defendant's said answer were true. He also denies the statement that plaintiff agreed to waive and set aside said Bremen awards.

48 He admits that on January 27th, 1911, plaintiff and defendant entered into a written agreement providing for an arbitration between said plaintiff and defendant to be had at Liverpool, England, and he admits that "Exhibit A" attached to defendant's said answer is a substantially correct copy of said written agreement. Plaintiff admits that both he and the defendant proceeded to act under said agreement of January 27th, 1911, by appointing their respective arbitrators at Liverpool, and that samples were drawn from the cotton and submitted to said arbitrators. Plaintiff specially denies each and every one of the remaining allegations in said section (*f*), and particularly denies the charges that he interfered with the proposed arbitration at Liverpool, and made efforts to prevent same from taking place, and succeeded in preventing any arbitration at Liverpool. The plaintiff says that on the contrary he endeavored to facilitate and bring about an arbitration at Liverpool, and that the true and only reason such arbitration did not take place was that the arbitrators ascertained on investigation that the standard and criterion to which they were limited by the terms of the written agreement did not exist on the dates of the Bremen sales, by reason of which situation said written agreement for arbitration at Liverpool was inoperative and impossible of performance.

Plaintiff denies the allegation in section (*i*) of paragraph IV of defendant's said answer, to the effect that any payments made by plaintiff to the Bremen buyers were entirely voluntary on his part and were not legally required of plaintiff because the causes of action of said Bremen buyers against plaintiff were barred by limitation at the time of such payments. Plaintiff says that on the contrary said causes of action against him were not barred by limitation at

49 the time he paid the same, and that at the time plaintiff made such payments he was bound so to do by the written agreements which he had given to the said Bremen buyers. Plaintiff further denies that the defendant herein has any right to require him to plead limitation to a just debt, or obligation, even if such plea were available to plaintiff.

Plaintiff denies the allegation in section (*j*) of paragraph IV of defendant's answer to the effect that plaintiff succeeded in preventing the Liverpool arbitrators from acting, and also the allegation therein that the judgment heretofore recovered in this court by plaintiff against the defendant is a bar to plaintiff's recovery in this suit. Plaintiff admits that he brought and prosecuted a former suit in this court for the amount of all said Bremen awards and that he recovered judgment for a portion of said amount, and that his right to recover at that time for the remaining portion was denied. He says that such denial of a recovery for the amounts now sued for resulted from the fact that his cause of action for such amounts had

not then accrued by reason of the fact that he had not at that time paid such amounts to the Bremen buyers.

Plaintiff says in answer to section (*k*) of said paragraph IV of defendant's answer, that the allegation therein made is now immaterial in view of the fact that plaintiff has before this time paid off in full his obligations to the Bremen buyers, and his cause of action against the defendant herein has fully and completely accrued.

VI.

Specially answering defendant's allegations with reference to the letter of August 21st, 1908, quoted in defendant's answer,
50 plaintiff says that he received said letter, but in good faith interpreted and acted on the same as not intended to direct or request any change in the basis or manner of future arbitrations except to substitute the date of sale for the last day of landing as the time for the application of the differences for grade and staple. Not only did plaintiff so interpret and understand and act on said letter, but defendant, with full knowledge and means of knowledge that plaintiff was so doing, acquiesced in such interpretation and did not protest against but consented to the way and manner in which plaintiff was conducting and continued to conduct the business of his agency for defendant. Plaintiff, with defendant's knowledge, acquiescence, ratification and approval, continued in good faith to act on his aforesaid understanding of said letter during the entire cotton seasons of 1908-1909 and 1909-1910 and until after all the arbitrations made the basis of this suit had been completed and plaintiff's liabilities to the buyers concerned in such arbitrations had accrued. From time to time, beginning shortly after the sending of said letter of August 21st, 1908, and continuing through the cotton seasons of 1908-1909 and 1909-1910, many arbitrations were made of cottons sold by the plaintiff for defendant on the Bremen market on the same terms as existed in the sales concerned in this suit, which said arbitrations were conducted upon the same basis and conditions and in the same manner as the arbitrations involved in this suit, of all which facts defendant had full knowledge and ample means of knowledge concurrently with the transactions referred to. Defendant acquiesced in and ratified said transactions and paid the awards given against it in such arbitrations. Said conduct of defendant was well calculated to, and did, cause plaintiff to believe (and to
51 act on such belief) that his aforesaid interpretation of said letter was in harmony with defendant's purpose and intention and was approved by defendant. Wherefore, defendant is estopped to deny that plaintiff correctly interpreted said letter or to claim that any unauthorized basis for differences was applied in the arbitrations concerned in this suit. Plaintiff further says that as a matter of fact his interpretation of said letter was correct and that the contention defendant now makes with respect to the purpose and effect of said letter is an after-thought that originated subsequent to the filing of suit.

VII.

Plaintiff further pleads that defendant had for many years been dealing and doing business on the Bremen cotton market and was, or should have been, familiar with its rules, usages and customs. That defendant was also represented in all the arbitrations involved in this suit by controllers selected by it for that purpose, who were on the ground and were at all times acquainted with all the steps and details of all arbitrations. That, if any of the arbitrators who passed on defendant's cotton were biased in favor of the purchasers or prejudiced against defendant (which plaintiff denies), such attitude on their part was known to said controllers and to defendant before the arbitrations were completed and before it was too late to object on that ground and prevent any but fair and impartial arbitrators from acting. That, if there were any irregularities in the arbitration proceedings (which plaintiff denies), the same were known to defendant's said controllers and to defendant at the time they occurred and before the completion of the arbitrations and at a time when such irregularities could have been successfully
52 objected to by defendant or its controllers. That, under the circumstances above stated, defendant and its controllers made no objections to the arbitrations or to the personnel of the arbitrators or to any alleged irregularities in the proceedings, but on the contrary consented to and participated in all such arbitrations and suffered the same to be completed without objection or protest and plaintiff's liability for the amounts of the awards to be irrevocably fixed and fastened upon him. That, in view of the facts and circumstances stated, defendant has waived any ground of objection it may have had to said arbitrations or to the personnel of the arbitrators or to the course of the proceedings, and defendant is now estopped to set up any such matters in this suit.

VIII.

With reference to the alleged contract of January 27th, 1911, for an arbitration at Liverpool, plaintiff says he executed the agreement copied in substance as "Exhibit A" to defendant's amended answer, but he denies that the arbitration awards made the basis of this suit have ever been waived or in any manner set aside or their validity in any way impaired. Said agreement, so far as concerns the cottons arbitrated at Bremen and concerned in this suit, proved to be impossible of performance in that it required the Liverpool arbitrators to arbitrate on the same grades and staple descriptions that the cottons concerned in this suit were sold upon in the Bremen market and in proceeding with their arbitrations to apply the differences that were actually made for C. I. F. and 6% cotton on the Liverpool market by buyers from Birge-Forbes Co. and other American
53 shippers on the very dates of the Bremen sales concerned in this suit, whereas after said agreement was made the fact developed that on the dates in question there were no transactions at

Liverpool in the grades and staples of cotton to which the arbitrators were limited and hence that no basis existed upon which the Liverpool arbitrators could proceed; and consequently the arbitrators refused to proceed with the arbitration. Plaintiff in good faith made every possible effort to have said agreement fully and fairly carried out and performed, but, as above shown, an essential element of the contract, constituting a necessary basis for its operation, and which the parties mutually supposed to exist, turned out to have been nonexistent, by reason whereof the said written instrument of January 27th, 1911, never became a legal contract at all and could not and did not have the effect of waiving or superseding the Bremen awards. In this connection plaintiff further says that the Bremen arbitrations were had between the buyers of the cotton on the one hand and the defendant herein on the other, whereas the alleged agreement for a Liverpool arbitration was between plaintiff, Heye, and the defendant herein, the Bremen buyers not being parties thereto. Hence the first arbitration plaintiff agreed to have with the defendant was the one to be had at Liverpool, and the failure for any reason to consummate the Liverpool arbitration would only have the effect of remitting plaintiff to his original cause of action, which was based upon and grew out of the said Bremen awards. Wherefore, plaintiff says that said Bremen awards have at all times been and now are in full force and effect.

54 IX.

Premises considered, plaintiff prays judgment as prayed in his first amended original petition.

LASSITER, HARRISON & ROWLAND,
WOLFE & WOOD,
Attorneys for Plaintiff.

STATE OF TEXAS,
County of Tarrant:

Before me, the undersigned authority, on this day personally appeared R. M. Rowland, who, being duly sworn, says that he is one of the attorneys for the plaintiff in the above entitled cause; that he is familiar with the above and foregoing supplemental petition; and that he believes the matters and things stated in paragraphs four to eight, inclusive, of said supplemental petition are true and correct.

R. M. ROWLAND.

Sworn to and subscribed before me this the 3rd day of December, A. D. 1914.

[SEAL.]

U. M. SIMON,
Notary Public, Tarrant County, Texas.

Endorsed: No. 83 Law. Carl R. Heye, Plaintiff v. The Birge-Forbes Co., Defendant. Plaintiff's First Supplemental Petition. Filed Dec. 4, 1914. J. R. Blades, Clerk U. S. Court, by M. B. Oslin, Deputy.

55 *Plaintiff's Second Supplemental Petition.*

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES CO., Defendant.

Now comes Carl R. Heye, plaintiff in the above cause, and by leave of court files this his second supplemental petition, and in reply to defendant's second amended original answer says:

1. He demurs generally to said second amended original answer and says the same is insufficient in law, and of this he prays the judgment of the court.

2. Plaintiff specially excepts to subdivision 5 of section (*e*) of paragraph III of said answer because the same is too vague, general and indefinite and does not state specific facts sufficient to constitute a defense to the enforcement by plaintiff of the awards in question. Plaintiff further specially excepts to all the allegations in said subdivision as to the alleged experiences of Bremen cotton men with forged and fraudulent bills of lading, because such allegations are immaterial and irrelevant in this suit and are of a prejudicial nature.

3. Plaintiff specially excepts to section (*i*) of paragraph III. of said answer, because the alleged facts stated would, if true, be immaterial and insufficient to constitute a defense to plaintiff's suit.

4. Plaintiff specially excepts to section (*l*) of paragraph III. of said answer, because it does not appear therefrom that any attempt has been made in the contracts of sale or the Bremen rules
56 to oust completely the jurisdiction of the courts over any and all controversies that might arise under the contracts, and because, even if such had been done, the law would not permit defendant to raise or rely upon such a matter now for the first time and after having voluntarily participated in the arbitrations.

5. Plaintiff specially excepts to all that part of section (*m*) of paragraph III. of said answer that sets up certain alleged fraud and false testimony on the part of plaintiff at the trial of the other suit similar to the present one, because, while in fact no fraud was committed or false testimony given by plaintiff, nevertheless, even if defendant's allegations here excepted to were true, they would be immaterial and insufficient to constitute any defense to the present suit and would furnish no legal ground for impeaching the judgment in said former suit or impairing its binding force as res adjudicata of the matters passed upon in rendering it.

6. Plaintiff specially excepts to all that part of section (*n*) of paragraph III. of said answer that attempts to plead the limitation law of Germany and to claim that plaintiff's obligations to the Bre-

men buyers were outlawed before he paid them and hence that such payments by plaintiff were purely voluntary and not recoverable by him from defendant. Said allegations of defendant are too vague and general and do not specifically set out the alleged law relied on; also it does not appear from said pleading that the law of Germany, any more than the law of Texas, requires plaintiff, for the benefit of defendant, to repudiate a just debt and a moral obligation, even though it were in his power to interpose successfully the technical defense of limitation.

7. For further reply to said answer, if such be necessary, plaintiff denies all and singular the allegations therein and demands strict proof of the same.

57 8. Plaintiff also adopts and makes a part hereof all the denials and allegations contained in his 1st supplemental petition filed the 4th day of Dec., 1914.

9. Wherefore, plaintiff prays judgment as prayed for in his first amended original petition.

LASSITER, HARRISON & ROWLAND,
J. A. L. WOLFE AND
J. H. WOOD,
Attorneys for Plaintiff.

Endorsed: No. 83. Carl R. Heye, plaintiff, vs. The Birge-Forbes Company, defendant. Plaintiff's 2nd supplemental petition. Filed May 22, 1916. J. R. Blades, clerk.

Agreement as to Certain Translations.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83.

CARL R. HEYE

vs.

THE BIRGE-FORBES CO.

We, George C. Butte and C. Von Carlowitz, witnsses in the above cause, have examined Wang's English translation of the German Civil Code, and we mutually find and agree that the following sections are correctly translated in said book:

Chapter 5; Secs. 194-225; 459-480; 765-778 [except the word "guaranty," instead of "suretyship," would be the better translation].

GEORGE C. BUTTE.
C. VON CARLOWITZ.

Endorsed: Agreement as to certain translations. Filed Jan. 5, 1917. J. R. Blades, clerk U. S. Court, by M. B. Oslin, deputy.

58 *Verdict of the Jury.*

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

We, the jury, in obedience to the direction of the court, find for the plaintiff, Carl R. Heye, and against the defendant, The Birge-Forbes Company, in the sum of Forty-one Thousand Five Hundred Thirty-six and 79/100 ($41,536.79) Dollars.

W. J. LONG, *Foreman.*

Endorsed: No. 83. Carl R. Heye vs. Birge-Forbes Co. Verdict. Filed Jan'y 5, 1917. J. R. Blades, clerk.

Judgment of the Court.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

On the 2nd day of January, 1917, the above entitled cause came on to be heard, and both parties appeared by their attorneys, and announced ready for trial. Thereupon came a jury of twelve lawful men, to-wit: W. J. Long, and eleven others, which jury was regularly empanelled and sworn to try the cause. And after hearing the evidence introduced by both parties, the court on January
59 5th, 1917, orally charged the jury, and in and by said charge directed the jury, to find for the plaintiff in the sum of $41,536.79. Thereupon, the jury returned into open court, in accordance with the court's direction, their verdict as follows, to-wit:

"We, the jury, in obedience to the direction of the court, find for the plaintiff, Carl R. Heye, and against the defendant, The Birge-Forbes Company, in the sum of Forty-one Thousand Five Hundred Thirty-six and 79/100 ($41,536.79) Dollars.

W. J. LONG, *Foreman.*"

It is therefore considered and adjudged by the court, in accordance with said verdict of the jury as directed by the court, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, The Birge-Forbes Company, a private corporation, the sum of Forty-one Thousand, Five Hundred, Thirty-six Dollars and Seventy-nine Cents ($41,536.79), together with interest thereon from this 5th day of January, 1917, at the rate of four per cent per annum, and all costs of this suit, except the costs already adjudged by the court against the plaintiff by an order entered in this case on the 23rd day of May, 1916. It is further adjudged and ordered by the court that plaintiff have his execution for the enforcement of this judgment in his favor, and that the officers of the court have their execution against plaintiff for the costs heretofore adjudged against him, and for all costs incurred by him in this suit, in the event the costs herein adjudged against the defendant shall not be satisfied and paid by the defendant.

Endorsed: No. 83. Carl R. Heye vs. The Birge-Forbes Company. Judgment of the Court.

60 *Motion for Allowance of Time to File Bill of Exceptions.*

In the District Court of the United States, Eastern District of Texas.

No. 83.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

Comes now the defendant and prays the court for ninety days after the adjournment of this term of court within which to prepare and present to the court and have approved its bill of exceptions herein.

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

Endorsed: No. 83. Carl R. Heye vs. The Birge-Forbes Co. Motion for time to file bill of exceptions. Filed Jan. 6, 1917. J. R. Blades, clerk U. S. Court, by M. B. Oslin, deputy.

Order.

In the District Court of the United States, Eastern District of Texas.

No. 83.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

On this day came on to be heard the motion of the defendant for ninety days after the adjournment of this term in which to prepare, and file, its bill of exceptions herein, and the said motion having been heard and understood by the court is, in all things, granted.

61 It is therefore ordered, adjudged, and decreed by the court that there shall be, and is hereby, granted to the defendant ninety days after the adjournment of this term of this court in which to prepare and present its bill of exceptions in this cause. This January 6th, 1917.

GORDON RUSSELL, *Judge.*

Endorsed: No. 83. Order. Carl R. Heye, vs. The Birge-Forbes Co. Jan. 6.

Bill of Exceptions.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83.

CARL R. HEYE

vs.

THE BIRGE-FORBES CO.

Be it remembered that on the trial of the above entitled and numbered cause in the District Court of the United States for the Eastern District of Texas, sitting at Sherman, on January 2nd, 3rd, 4th and 5th, 1917, the following evidence was introduced, proceedings had and exceptions reserved, to-wit:

Motion to Suppress Depositions.

Before the introduction of testimony was begun the defendant presented to the court and urged the court to grant its motion to suppress depositions as follows:

"Now comes the defendant and moves the court to suppress the depositions of Carl R. Heye and Oscar Polletin filed herein on the 30th day of December, 1916, for the following reasons, to-wit.

62 First. It appears that the depositions de bene esse were taken in a foreign country, to-wit, Germany, and there is no authority in law for the taking of such depositions outside of the United States of America.

Second. If said depositions were taken under the Act of 1892, they were not sent to the court by mail; there is no receipt or indorsement by the Post Master at the point where mailed acknowledging that he received it from the hands of the officer taking the depositions and signed by him as required by the commission nor of the officer who took the depositions that he delivered to the Post Master. If sent by private conveyance, it was not delivered to the court by the carrier in person as required by the commission.

Third. It appears that the said Carl R. Heye is plaintiff. There is no authority in law for the taking of the deposition of the plaintiff."

Deposition of Carl R. Heye.

The depositions of the said witnesses Carl R. Heye and Oscar Polletin to which the foregoing motion to suppress is addressed are set out herein in full as follows:

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

Direct Interrogatories Propounded by Plaintiff to the Witness Carl R. Heye, Who Resides at Bremen, Germany.

I.

Please state your name, age, residence and occupation. Are you the plaintiff in the above entitled suit?

63

II.

Referring to the arbitration allowances made against the Birge-Forbes Company in favor of certain European buyers on account of cotton sold them at Bremen through you as selling agent during the cotton season of 1910-1911, and referring to the first suit brought by you against the Birge-Forbes Company based upon said claims,

which suit went to judgment in this court on May 23rd, 1913, please state whether or not you ever paid to said European purchasers the remaining sums due them that you had not actually paid at the time of the trial of said first suit?

III.

If you have paid said indebtedness, state whether or not you first settled it by giving the creditors your notes, drafts or written promises to pay? If so, when were such notes or written promises executed by you? When were they delivered by you to the payees? Were they negotiable papers? When were they to become due?

IV.

If any such notes were executed and delivered by you, state the names of the persons or firms to whom they were given and the amount of the note given to each such person or firm?

V.

State whether you afterwards paid off the aforesaid notes or drafts, if any? If so, when did you do so, to whom did you make the payments, how did you obtain the means to do so, in what medium, whether bank check or cash, did you make payment, and just
64 what amount did you actually pay out to the respective creditors? If you paid by check on your bank, were the checks honored and paid in full?

VI.

If you gave notes or drafts as above inquired about and afterwards paid off, what was done with and what became of such notes when you paid them? Were they or not surrendered to you by the owners and holders? If they were surrendered, when were they so surrendered and where have they been ever since? Were any receipts given by the creditors evidencing payment? If so, were they on the back of the notes or separate from the notes, and how did they read in English?

VII.

When you made said notes, if you did, state whether or not they were given by you and accepted by said creditors in full settlement and satisfaction of the remaining claims said creditors had against the Birge-Forbes Company? State whether or not after the giving of said notes said creditors looked solely to you and your notes for payment and not to the Birge-Forbes Company any more?

LASSITER, HARRISON & ROWLAND,
WOOD, JONES & HASSELL,
Attorneys for Plaintiff.

Time, notice and copy are hereby waived, and it is agreed that officers may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived.

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

65 Cross Interrogatories to the Witness Carl R. Heye.

1. Have you had any conversation with Alfred Koch, D. H. Lippitt, Arnold Fritze, Eduard Muller, L. Meyer-Haekstroth, Peter Lentz, H. L. Baron, Richard Dorfel, Bernard Cohn, Paul Schmitz, Fritz Entholt, G. Will, W. Cordez and James Heye, or any one of them, relative to their testimony, or what they will swear in this case, or relative to their depositions in any way?

2. Have you discussed with them, or any of them, their testimony in this case? If yes, when? Why?

3. Have you been present when their depositions were being taken, or when any were taken? If yes, why were you present?

4. Have you written to them, or to any of them, in regard to their testimony or this case in any way? If yes, attach a correct copy of your communication, having the officer attest its correctness.

5. Make out a complete itemized statement of each and every amount you paid to the buyers of said cotton on said alleged awards, prior to May 2nd, 1912. Have you done so? If not, why? You are asked for none after the date mentioned, but for payment prior to said date only.

6. Explain fully what security you furnished to enable you to get the money necessary to make said payments, if any.

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

66 STATE AND CITY OF BREMEN,
Empire of Germany:

—— —— Court of ——, —— District of Texas, at ——, Texas.

No. —.

CARL R. HEYE

vs.

BIRGE-FORBES CO.

Answers and depositions of Mr. Carl R. Heye taken before me, the undersigned authority, in answer to the attached direct and cross interrogatories, hereunto attached, in the case of Carl R. Heye vs.

Birge-Forbes Company, now pending in said court, I cause- to come before me at my office in the city and state of Bremen, Empire of Germany, the witness Carl R. Heye, therein named, a resident of the city of Bremen, aged 49 years, who being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross interrogatories in said case propounded to him, proceeded to answer the same as follows:

In answer to interrogatory I the witness says.

I, Carl R. Heye, was born in Bremen in the year of 1867 therefore I am 49 years of age. My residence, i. e. the place where my firm exists, is Bremen. Since the end of the year 1914, I am in Military service in the active German Army and am not entitled to tell where I reside. Before outbreak of the war I was a cotton buyer and agent in Bremen since 1900, and heretofore a cotton buyer under the style of Heye and Muller. I am the plaintiff in the case against the Birge-Forbes Company, Sherman, Texas.

In answer to interrogatory II the witness says:

I state that I paid to the European purchasers of the Birge-Forbes Company's shipments during the cotton season 1910-1911 all
67 remaining sums, still due them when judgment was given in my favor for the first part of this suit on May 23rd, 1913.

In answer to interrogatory II the witness says:

I paid the balance of the claims against the Birge-Forbes Company on April 22nd, 1914, to the creditors in promissory notes executed by me. They were delivered on the same day, April 22nd, 1914, to the payees. They were negotiable papers and became due on October 22nd, 1914.

In answer to interrogatory IV the witness says:

These promissory notes were delivered to the following firms and their amount was

To Addix & Cordes	M	4,151.95
Addix & Will	"	2,141.30
H. Bischoff & Co.	"	30,302.58
Boden & Haac	"	14,429.05
S. L. Cohn & Sohn	"	17,130.76
F. Dorfel, Prague	"	10,192.25
McFadden Bros. & Co	"	29,592.95
Gebruder Fritze & Co	"	5,722.75
Knoop & Fabarius	"	6,602.15
Lentz & Hirschfeld	"	5,495.51
Eduard Meyer & Co	"	2,467.10
Muller, Petzel & Co	"	11,025.47
Schmitz & Roessingh	"	8,129.60
Alex. Sprunt & Son	"	12,332.55
	M	159,715.97

68 In answer to interrogatory V the witness says:

All promissory notes, particulars of which I stated in my answers to interrogatories III and IV, have been paid off by me in

cash on May 6th, 1914, to those Bremen firms I was obliged to pay the money when due. To Mr. F. Dorfel, residing at Prague, I made a direct remittance, which check has been honored and paid in full.

In answer to interrogatory VI the witness says:

Against my full payments of the promissory notes, executed by me on April 22nd, 1914, such notes were surrendered to me on May 6th, 1914, when paid in cash, by the owners. Since May 6th, 1914, I keep the surrendered notes in my safe. The receipts for full payment of the notes were given by each firm on the back of the respective notes and read in English:

"Amount received.

Bremen, May 6th, 1914.
(Signed) ADDIX & CORDES."

All other firms as stated in my answer to interrogatory IV gave the same receipt for full payment on the back of the respective notes. No other receipt separate from the note was given.

In answer to interrogatory VII the witness says:

When I executed and delivered my promissory notes on April 22nd, 1914, to my creditors, resulting from deficiency in quality of shipments of the Birge-Forbes Company during the season of 1910-1911, they were accepted by them as full settlement and satisfaction of the remaining claims against the Birge-Forbes Company, and they solely looked to me for further payment. They affirmed that they had not to do any more with the Birge-Forbes Company, which
69 shippers they intend to erase from their lists and whose names ought not to be called again in their offices in any event.

Cross-interrogatories:

In answer to interrogatory I the witness says:

I have had no conversation with any person stated in question I relative neither to their testimony nor what they will swear nor to their depositions in any way.

In answer to interrogatory II the witness says:

My answer is no, besides I feel obliged never to mention the name of the Birge-Forbes Company again before those gentlemen.

In answer to interrogatory III, the witness says:

No.

In answer to interrogatory IV the witness says:

No.

In answer to interrogatory V, the witness says:

I have not made out the wanted statement of payments prior to May 2nd, 1912, this taking too much time and only a very small furlough was granted to me, just sufficient — these depositions to be taken as they are, the more so as in my opinion it is of no practicable use to prove itemized payments before May 2nd, 1912, when I have made full payment in cash for the respective balances due, on May 6th, 1914. The whole sum I paid prior to May 2nd, 1912 was M153,033.33 or $36,610.96.

In answer to interrogatory VI, the witness says:

I furnished no securities at all to get the money necessary for the payment of the balances due, because I was enabled to redeem
70 the issued promissory notes in full cash on May 6th, 1914, i. e. on arrival of the proceeds, received from the Birge-Forbes Company after the first part of this case having been won.

Bremen, 30, October, 1916.

CARL R. HEYE.

Register Nr. 7697.

Which answers I caused to be reduced to writing, and they were sworn to and subscribed before me at my office in the city and state of Bremen, Empire of Germany on this 30 day of October, 1916, by the said Carl R. Heye.

In witnss whereof I have hereunto set my hand and official seal.

[SEAL.] DR. VOIGT,

Notary Public at the Free and Hanseatic City of Bremen.

Consulate of the United States of America, Bremen, Germany.

I, William Thomas Fee, Esqre. Consul of the United States of America at Bremen, do hereby certify that the document hereunto attached is under the seal and signature of Dr. Voight, a Notary Public in and for the Free and Hanseatic City of Bremen, Empire of Germany; that said seal and signature are true and genuine and that they are entitled to full faith and credit.

No. 406 $2. M11.20.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, at Bremen, this 31st day of October, A. D. 1915.

[SEAL.] WILLIAM THOMAS FEE,

Consul of the United States of America.

Stamp: William Thomas Fee, Bremen, American Consul."

71 *Deposition of Oscar Polletin.*

"In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

Direct Interrogatories propounded by plaintiff to the witness Oscar Polletin, who resides at Bremen, Germany.

I.

Please state your name, age, residence and occupation?

II.

State what buisness relations, if any, you now have or have had with Carl R. Heye of Bremen, Germany, plaintiff in the above styled suit? State fully and in detail what means and opportunities, if any, you have had for being familiar with said Heye's cotton business during the last few years? State whether or not you are in fact familiar with the cotton business and transactions of said Heye during the last few years? Also state about how long if at all, you have been acquainted with such business of Carl R. Heye? In this connection state particularly whether or not you are now and were at the time of the transactions acquainted with the cotton business on the Bremen market which the said Heye transacted for the Birge-Forbes Company of Sherman, Texas, during the cotton season of 1910-1911?

III.

State what said Carl Heye is doing at the present time, and where he is, and whether or not it is now possible or practicable to
72 obtain his depositions to use as evidence in this case? If you say it is not practicable for said Heye to get his depositions then explain fully the reasons why? If said Heye is not engaged in active service in the German army, state how long he has been so engaged, and state whether or not it will be practicable to obtain his depositions at any time in the near future?

IV.

Referring to the cotton sold on the Bremen market by Carl R. Heye for the Birge-Forbes Company of Sherman, Texas, during the

season of 1910-1911, and referring also to the arbitration allowances made on said cotton in favor of the buyers thereof, please state whether or not at any time subsequent to May, 1913, Heye settled with said buyers for the remaining sums due them or claimed to be due them?

V.

If Heye did settle such balances, what form was settlement first made in? Did he first pay cash, or did he first give his notes or written promises to pay such balances? If he gave notes or written promises, state the date or dates the same were executed and delivered, the various amounts of same, the names of the parties to whom they were payable, the dates when due, the rate of interest, if any interest was to be paid, and the date or dates when the interest would begin to run? Also state whether said notes were negotiable papers according to the law then in force at Bremen?

VI.

Attach as exhibits to your depositions the originals of all such notes or written promises, if any, given by Heye to parties in Germany or elsewhere to cover the balances of their claims as aforesaid? Do not fail to attach the originals of these notes, as copies will not
73 answer the purpose. Also attach english translations of said notes.

VII.

Are you familiar with the handwriting of Carl R. Heye? If so, state whether or not the signature- of the maker of the notes above referred to, as they appear on said notes, are in the handwriting of said Carl R. Heye and are his genuine signatures.

VIII.

Were said notes ever delivered by said Heye to the firms or persons to whom they were payable? If so, when?

IX.

Were you present when said notes were signed by said Heye, if they were so signed, or when they were delivered to the payees, if they were so delivered?

X.

If the notes above referred to were in fact made and delivered by said Heye, did they ever come back into his possession again? Did the holders of said notes ever surrender them up to said Heye or to his office or agents or business associates? If so, were they so surrendered up, by whom were they so surrendered, why was it done, what, if

anything, was endorsed or written on the notes at the time of their surrender, and what are your means of knowing about the matter?

XI.

If said notes were so surrendered, where have they since remained up to the present time? In whose possession have they been and why did they so remain?

74

XII.

If said endorsement or writing was placed on the back of said notes, state whether or not you are familiar with the handwriting of the persons making such endorsements on the notes? If you are, then state who made such endorsements and whose handwritings they are in?

XIII.

During the times above inquired about were any books kept in the office of Carl R. Heye containing a record of the business transactions of that office? If so, who kept said books or made the entries in same, where are said books now and in whose custody are they? If you know, state whether or not said books were accurately and correctly kept, state when the entries were made with reference to the time of the transactions recorded, and state whether or not said Heye and his office force continuously and regularly relied and acted upon said books and upon the truth of the entries therein in the daily conduct of the business of said office?

XIV.

If books such as above inquired about were kept, were any entries made in them concerning the execution and delivery of the notes above referred to or concerning the payments of said notes? If so, attach as an exhibit to your depositions a true copy translated into English, of all entries pertaining to said notes.

XV.

If you are not yourself the keeper of said books and the maker of said entries, then what is the name of the person who is or was, and where is he now?

75

XVI.

If you know, state whether or not Carl R. Heye ever paid off in actual money the notes above referred to? If so, when did he make such payments? Also state the amounts of such payments, the manner of making same and the names of the persons or firms receiving the same? Attach as an exhibit to your depositions a complete list

of such payments, showing dates, names of parties or firms paid, and amounts of money paid by said Heye?

XVII.

When Heye made payment of said notes, if he did, was he given any receipts other than what was endorsed on the backs of the notes?

LASSITER, HARRISON & ROWLAND,
WOOD, JONES & HASSELL,
Attorneys for Plaintiff.

Time, notice and copy are hereby waived, and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories.

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

Cross-interrogatories to the witness Oscar Polletin:

1. Are you the same person named Oscar Polletin who testified by deposition in this case in November, 1915?
2. When did you last see, or hear from, the plaintiff?
3. Is plaintiff alive, or dead?
4. Have you heard that he was dead? Give the source of your information?
5. Have you heard any of his near relatives, or friends,
76 at any time state that he was dead, or that they had heard that he was dead?
6. Have you read anything officially issued bearing on whether he is alive, or dead, and if yes, state what it is? Attach a copy if you can do so.
7. Is it not a fact that you were not personally present when any settlement referred to in direct interrogatory number IV was made? If you were personally present, state (*a*) the name of each person who was present in each instance, and (*b*) when and where such settlement took place and was made?
8. Is it not a fact that you were not personally present when any of the alleged notes referred to in either direct interrogatories IV, V or VI, were made or executed?
9. Is it not a fact that you were not present when any of said notes were delivered by plaintiff or for him?
10. If you say that said notes were afterwards surrendered to the plaintiff, were you personally present when said notes were surrendered to the plaintiff? Is it not a fact that you were not personally present when said notes were surrendered to the plaintiff by the holders thereof, if you have testified that same were so surrendered, in answer to any of the direct interrogatories?
12. Is it not a fact that you were not personally present at any

time when said notes were paid, if you have testified that same were paid at any time?

13. Is it not a fact that your position with plaintiff was that of Broker? Was not that the only capacity which you had with him during the time in question and was it not in that capacity only that you had to do with the sales involved in this suit?

77 14. Did you have anything to do with keeping the books and records of said sales in the books? Is it not a fact that you were not bookkeeper for the plaintiff in the season of 1910-1911?

15. In direct interrogatories numbers XIII and XIV you are asked concerning the books kept in the office of plaintiff containing a record of the business transactions of said office. If in answer to direct interrogatory XIV you state, in effect or in substance, that entries were made in them concerning said notes in any respect, state (*a*) whether or not you in person made said entries in said book or books, and (*b*) when you made said entries?

16. Is it not a fact that you did not make said entries?

17. Is it not a fact that you did not see said entries made in said book or record?

18. Is it not a fact that you were not personally present at any time when, and at the place where, said entries were made in said book?

19. If you were personally present and saw said entries made, state (*a*) into how many different books the same were made and (*b*) when? Were you personally present when each entry was made in each book?

20. Attach to your answer to this interrogatory, or for your answer thereto, an exact copy of each page (entire page) on which the entries were made referred to in direct interrogatory number XIV. Translate the same into English.

21. If you say in answer to direct interrogatory number XVI that said notes have been paid, state whether or not you were personally present when said notes were paid?

22. If you say, in effect, in answering direct interrogatory
78 number XVII that receipts were given when said payments were made, is it not a fact that you were not personally present when any receipt was given such as therein asked about?

23. Do you write and speak and do you understand both the English and the German languages?

24. Does the officer taking your deposition understand and write and speak both the English and the German languages?

25. Are you still in the employment of plaintiff? When did your employment by him cease?

26. Have you made any suggestion whatever to Alfred Koch, D. H. Lippitt, Arnold Fritze, Eduard Muller, L. Meyer-Hackstroxh, Peter Lentz, H. L. Baron, Richard Dorfel, Bernard Ophn, Paul Schmitz, Fritz Entholt, G. Will, W. Cordes, or James Heye, other witnesses whose depositions are being taken in this case, or to any of them, relative to their depositions in this case?

27. Are you acquainted with the parties named in the preceding

interrogatory, or any of them? If yes, state the names of each one with whom you are acquainted?

28. Have you discussed with them, or any of them, in any respect any of the interrogatories to them propounded? If yes, why have you done this? Why was it necessary for them to talk to you, or for you to talk to them, about their answers, or about this case, or their testimony in the case?

29. Did you suggest, or prepare, any answer for any of said witnesses? If you have, which answers did you prepare or to which interrogatories did you make any suggestion to the witness relative to his answer, or relative to the interrogatory?

79 30. Were you present while any of the depositions of said parties were being taken? Have said depositions been taken at the time you are giving your deposition? If not, do you intend to be present while theirs, or any of theirs, is being taken?

31. Who is looking after this case in Bremen while plaintiff is away? Is it not a fact that you are?

32. Who arranged with the officer to take your deposition in this case? Who has the correspondence with plaintiff's attorneys relative to the case while he is away?

33. Who arranged with the officers to take the depositions of the other witnesses in this case, those named in cross interrogatory 26? Is it not a fact that you did, or will?

35. Who attended to paying the officer his fees for taking said depositions? Is it not expected that you will do this, or have you not done it?

36. Give a copy of each letter or other communication sent you to any of the witnesses named in cross interrogatory number 26 relative to their depositions?

37. Have you talked with any of said witnesses relative to their depositions? If yes, give the name of each one with whom you have talked and about which particular interrogatory did you talk with said witness?

38. If the depositions of the other witnesses named have not been taken, why have they not been taken? What is your purpose in delaying the taking of their depositions until after your own is taken?

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

80 STATE AND CITY OF BREMEN,
Empire of Germany:

—— Court of —— ——, District of Texas, at ——, Texas.

No. —.

CARL R. HEYE

vs.

BIRGE-FORBES CO.

Answers and depositions of Mr. Oscar Polletin taken before me, the undersigned authority, in answer to the attached direct and cross interrogatories, hereunto attached in the case of Carl R. Heye vs. Birge-Forbes Company, now pending in said court, I cause- to come before me at my office in the City and State of Bremen, Empire of Germany, the witness, Oscar Polletin, therein named, a resident of the City of Bremen, aged 38 years, who being by me duly sworn to speak the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross interrogatories in said case propounded to him, proceeded to answer the same as follows:

In answer to interrogatory I, the witness says:

Oscar Polletin, am 38 years of age and living in Bremen as a cotton Broker. For the time being I am required by the German army but have the occasion now and then to call on the office of the firm of Carl R. Heye to see if anything new has arrived.

In answer to interrogatory II, the witness says:

I am employed as a cotton Broker by Mr. Carl R. Heye, and in this capacity I have to work all orders and offers which the firm receives in the Bremen market. Therefore I am familiar with all cotton transactions, the firm made since my employment with the firm in the year 1900, especially with all transactions made
81 with the Birge-Forbes Company of Sherman, Texas, so too with those during the cotton season of 1910-1911.

In answer to interrogatory III, the witness says:

Mr. Heye joined his regiment in the beginning of the war, but under the Martial law I am not permitted to give any particulars of his whereabouts and his doings. I induced him to try to get leave for a short trip to Bremen to get his depositions taken, but I am doubtful if a furlough will be granted to him. In former times his efforts in this direction have been rejected and therefore in my opinion it will not be practicable to obtain his depositions at any time during the war.

In answer to interrogatory IV, the witness says:

Yes, Mr. Heye settled on April 22nd, 1914, with the different buyers of the shipments of the Birge-Forbes Company during the season of 1910-1911 to pay the remaining sums due them on October 22nd, 1914.

In answer to interrogatory V, the witness says:

The above settlement was made by Mr. Heye, he giving them notes for the balance due them. All of them were issued on April 22nd, 1914, and due on October 22nd, 1914, no interest to be paid. All notes were duly stamped and according to the law, then and now ruling, negotiable paper. To prove this I induced Mr. Dr. Voigt, a Notary Public at the Free and Hanseatic City of Bremen to give a written declaration on this behalf and add it as 'Exhibit AA.'

The various amounts and names of parties are as follows:

82	Addix Cordes	M	4,151.95
	Addix & Will	"	2,141.30
	H. Bischoff & Co.	"	30,302.58
	Boden & Haac	"	14,429.05
	S. L. Cohn & Sohn	"	17,130.76
	F. Dorfel, Prague	"	10,192.25
	McFadden Bros. & Co.	"	29,592.95
	Gebruder Fritze & Co.	"	5,722.75
	Knoop & Fabarius	"	6,602.15
	Lentz & Hirschfeld	"	5,495.51
	Eduard Meyer & Co.	"	2,467.10
	Muller, Petzel & Co.	"	11,025.47
	Schmitz & Roessingh	"	8,129.60
	Alex. Sprunt & Son	"	12,332.55
	Total*ly*	M	159,715.97

In answer to interrogatory VI, the witness says:

I am sorry that in answering this question I can only repeat what I stated in my last year's depositions, that I consider it too unsafe to attach the wanted originals of these notes on account of the uncertainty of the mail during the present war. I know from experience that almost all correspondence with my American friends—hence and thence—has not reached their destination and I do not dare to risk this way with the original notes. Therefore I trust that the judge will let the true copies of the originals, sent in November, 1915, as exhibits A-O, answer the same purpose as the originals, the more so as the true copy and its exact translation of each original note has been witnessed by Mr. Dr. Voigt, a Notary
83 Public at the Free and Hanseatic City of Bremen, Germany.

In answer to interrogatory VII, the witness says:

I am quite familiar with the handwriting of Carl R. Heye and state that the signatures of the maker of the original notes, as they appear on the original notes—detained here—are in the handwriting of Carl R. Heye and are his genuine signatures. To confirm this fact too I induced Mr. Dr. Voigt, to whom the handwriting of said Heye is quite familiar too, to make a solemn statement to this effect and attach his declaration to this answer as 'Exhibit BB.'

In answer to interrogatory VIII, the witness says:

These original notes were delivered to the respective creditors of

the firm of Carl R. Heye, to whom they were payable, on April 22nd, 1914.

In answer to interrogatory IX, the witness says:

I was present when Mr. Heye signed the promissory notes and then ordered Mr. Matussek to deliver the notes to the payees, but I was not present when they were delivered to the payees.

In answer to interrogatory X, the witness says:

The notes referred to were in fact made, i. e. executed by Mr. Matussek—then a clerk of Mr. Heye's office who in the meantime died from wounds, received in the war—and signed by Mr. Heye himself. The notes were surrendered by the holders to Mr. Matussek, when he paid off the respective sums, due them, in cash in their different offices on May 6th, 1914. My knowing of these facts results from my capacity as holder of the power of attorney for the firm of Carl R. Heye since 1903. Thus all payments of the
84 firm had to go through my hands. I furnished the necessary cash to Mr. Matussek, which was sufficiently available thanks to the proceeds received from the Birge-Forbes Co., after the first part of this case having been won, on May 6th, 1914. On my inquiry, when surrendering the notes to Mr. Heye's office again, Mr. Matussek informed me, that in the different offices of the creditors he paid the respective sums to a clerk, who brought the cash to the private offices of the principals and after a while surrendered him the note with the receipt signed on the back by the respective firm. This receipt on the back of the notes reads in English translation:

'Amount received

Bremen, May 6th, 1914
(Signed) ADDIX & CORDES.'

All other firms gave the same receipts.

In answer to interrogatory XI the witness says:

Since that time—May 6th, 1914—these notes have remained in my possession, i. e., in that of the firm of Carl R. Heye, where they have been locked up in the safe, because they may not be lost or burnt if perhaps a fire destroys the building.

In answer to interrogatory XII the witness says:

I am quite familiar with the handwritings of the persons who made the indorsements on the notes, there being no other indorsements than the respective receipts mentioned.

These handwriting are of

Mr. W. Cordes, who receipted for Addix & Cordes.
Mr. G. A. Th. Will, who receipted for Addix & Will.
Mr. Alfred Koch, who receipted for H. Bischoff & Co.
Mr. Fritz Entholt, who receipted for Boden & Haac.
85 Mr. Bernh. Cohn, who receipted for S. L. Cohn & Sohn.
Mr. Richard Dorfel, who receipted for F. Dorfel, Prague.
Mr. James Heye, who receipted for McFadden Bros. & Co.
Mr. Arnold Fritze, who receipted for Gebruder Fritze & Co.
Mr. H. L. Baron, who receipted for Knopp & Fabarius.
Mr. Peter Lentz, who receipted for Lentz & Hirschfeld.

Mr. Louis Meyer-Hackstroh, who receipted for Eduard Meyer & Co.

Mr. Eduard Muller, who receipted for Muller, Petzel & Co.

Mr. William Roessingh, who receipted for Schmitz & Roessingh.

Mr. William Walker, who receipted for Alex. Sprunt & Son.

Moreover—to prove these facts—I afforded a sworn statement of each person who signed the receipts for the respective firms, attached to my depositions of November 1914 as Exhibits A-O, which are in the possession of the court and which were taken by a German notary public.

In answer to interrogatory XIII the witness says:

Since the beginning of the firm books were kept in according with the law and entries were made by a clerk. The books are in custody of the firm. There is no doubt that those books were accurately and correctly kept and all entries were made exactly at the time they appeared. Mr. Heye and his office force relied and acted upon said books continuously and regularly and upon the truth of the entries therein.

In answer to interrogatory XIV the witness says:

I attach as 'Exhibits CC & DD' a true copy of the entries of the items—in English—concerning the delivery and payment of the promissory notes.

86 In answer to interrogatory XV the witness says:

The keeper of the books then was Mr. Matussek, who has died during the war.

In answer to interrogatory XVI the witness says:

I most positively know that Mr. Heye paid off in actual money the notes above referred to. He made those payments on May 6th, 1914. The manner of making those payments I stated already fully in my answer to interrogatory X. I attach as 'Exhibit EE' a complete list of such payments showing dates, names of firms paid, and amounts of money paid by Mr. Carl R. Heye.

In answer to interrogatory XVII the witness says:

When Mr. Heye made those payments in cash he was given no other receipt, than that indorsed on the back of the notes.

Bremen 11, November, 1916.

OSCAR POLLETIN.

Cross-interrogatories:

In answer to interrogatory 1 the witness says:

Yes, I have already testified by deposition in this case on November 29th, 1915.

In answer to interrogatory 2 the witness says:

I have last seen the plaintiff now, when he succeeded in getting leave for a day or two, journey included, and surprisingly came to Bremen for answering the questions re Birge-Forbes Co. on October 30th, a. c.

In answer to interrogatory 3 the witness says:

The plaintiff is alive.

In answer to interrogatory 4 the witness says:

I never heard that he was dead.

87 In answer to interrogatory 5 the witness says:
No rumors of such a kind have been stated by anybody at any time.
In answer to interrogatory 6 the witness says:
Mr. Heye was alive on October 30th, 1916, and still he is so, there is no doubt about.
In answer to interrogatory 7 the witness says:
I was not personally present when the said settlement, referred to in direct interrogatory IV was made.
In answer to interrogatory 8 the witness says:
I was not personally present when those notes were made, but I was personally present when Mr. Heye signed them.
In answer to interrogatory 9 the witness says:
I was not present when said notes were surrendered for the plaintiff to the payees, but I was personally present when Mr. Heye ordered Mr. Matussek to deliver the notes for him to the payees and I know that Mr. Matussek did so at once.
In answer to interrogatory 10 the witness says:
I was personally present when the notes were afterwards surrendered to Mr. Heye by Mr. Matussek, the clerk of the firm of Carl R. Heye, who himself got the notes surrendered by the holders in their respective offices as stated in answer to direct interrogatory No. X. I was not present when the clerk of the holders gave the note back to Mr. Matussek for the plaintiff in the respective office.
Cross interrogatory 11 is omitted.
In answer to interrogatory 12 the witness says:
I was not present when the notes were paid off by Mr. Matussek for the firm of Carl R. Heye, but I myself furnished to Mr.
88 Matussek the necessary cash out of the funds of the firm and I testify again that the notes were paid on May 6th, 1914.
In answer to interrogatory 13 the witness says:
I am employed as a broker by the firm of Carl R. Heye, but that was not the only capacity I had with the firm during the time in question and still for the time being. As already stated in my last deposition on November 27th, 1915, in answer to cross interrogatory No. 1 I am holding the power of attorney of the firm of Carl R. Heye since 1903, but I am not a partner of the firm nor have I any financial interest in this suit. My doing with the sales involved in this suit and my knowing of all pending facts results therefore from both: my capacity as a broker and as proxyman of the firm of Carl R. Heye.
In answer to interrogatory 14 the witness says:
I am not book-keeper for the firm, but in my capacity as holder of the power of attorney I had to control the books and to watch that all entries were all right.
In answer to interrogatory 15 the witness says:
As already stated I myself made not the entries in said books, but only controlled them and testify them as true ones.
In answer to interrogatory 16 the witness says:
I made not the entries but Mr. Matussek, the book-keeper, made them.

In answer to interrogatory 17 the witness says:

I did not see the entries made in said books, but afterwards I controlled the records and found them true.

89 In answer to interrogatory 18 the witness says:

Mr. Matussek made the entries in the books in the general office of the firm of Carl R. Heye, i. e., in the same room, where my residence is too, unless I have to visit the customers in Bremen to try them to buy cotton, which our friends have to offer through Mr. Heye. Naturally I drop in the general office daily very often to get new information of the foreign markets or of new orders and offers, that might have come in the meantime. Then of course I saw Mr. Matussek doing his work; if by chance he had any doubt about anything he had to ask me and I gave him the necessary instructions in my capacity as holding the power of attorney for the firm. So—at any time—I was informed of all that happened in the general office of Carl R. Heye.

In answer to interrogatory 19 the witness says:

I was personally present when Mr. Matussek made the entries concerning the promissory notes in question and afterwards those of the various payments. Entries were made in one book as the firm entertains for each American shipper separate accounts.

In answer to interrogatory 20 the witness says:

I have already attached a true copy in English of all entries concerning the delivery and payment of the promissory notes as Exhibits CC and DD to my answer to direct interrogatory No. XIV.

In answer to interrogatory 21 the witness says:

I was not personally present when said notes were paid, but I know that they were paid and ask you to kindly see my answer to direct interrogatory No. X, in which I described all whereabouts.

90 In answer to interrogatory 22 the witness says:

I was not personally present. Please see my preceding answer, referring you to my answer to direct interrogatory No. X.

In answer to interrogatory 23 the witness says:

I write, speak and understand both English and German languages.

In answer to interrogatory 24 the witness says:

Mr. Dr. Voigt—who is taking my depositions—writes, speaks and understands the English language as well as the German one.

In answer to interrogatory 25 the witness says:

Yes, I am still in the employment of Carl R. Heye.

In answer to interrogatory 26 the witness says:

I never made any suggestion whatever to any witness in this case at any time. Moreover it is impossible to take the depositions of the other witnesses, they being partly at the front partly detained from appearing, having moved to neutral countries to try to do business there.

In answer to interrogatory 27 the witness says:

I am acquainted with all parties named in cross interrogatory No. 26, no one omitted.

In answer to interrogatory 28 the witness says:

I have not discussed with anybody.

In answer to interrogatory 29 the witness says:

I never suggested nor prepared any answers to any witness in this case.

91 In answer to interrogatory 30 the witness says:

I was not present nor will be present. Said depositions have not been taken.

In answer to interrogatory 31 the witness says:

In my capacity as holder of the power of attorney for the firm of Carl R. Heye I am looking after the Birge-Forbes case.

In answer to interrogatory 32 the witness says:

I arranged with the officer and I have the correspondence with plaintiff's attorney while Mr. Heye is away.

In answer to interrogatory 33 the witness says:

As already stated in answer to cross interrogatory No. 26 it is impossible to take the depositions of the other witnesses.

Cross interrogatory is omitted.

In answer to interrogatory 35 the witness says:

The firm of Carl R. Heye is paying the officer's fees for taking the depositions.

In answer to interrogatory 36 the witness says:

There was no letter or any other communcation sent.

In answer to interrogatory 37 the witness says:

I spoke with nobody.

In answer to interrogatory 38 the witness says:

The depositions of the other witnesses cannot be taken at all, they being partly at the front, partly having passed away.

92 Bremen, 11 November, 1916.

OSCAR POLLETIN.

Register Nr. 7705.

Which answers I caused to be reduced to writing, and they were sworn to and subscribed before me at my office in the city and State of Bremen, Empire of Germany on this 11 day of November, 1916, by the said Oscar Polletin.

In witness whereof I have hereunto set my hand and official seal.

[SEAL.]

DR. VOIGT,
Notary Public at the Free and Hanseatic City of Bremen.

Consulate of the United States of America, Bremen, Germany.

I, William Thomas Fee, Esq're, consul of the United States of America at Bremen, do hereby certify that the document hereunto attached is under the seal and signature of Dr. Voigt, a notary public in and for the Free and Hanseatic City of Bremen, Empire of Germany; that said seal and signature are true and genuine and that they are entitled to full faith and credit.

No. 422. $2. M. 11.20.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, at Bremen, this 13th day of November, A. *A.*, 1916.

[SEAL.] WILLIAM THOMAS FEE,
Consul of the United States of America.

Stamp: William Thomas Fee, Bremen, American Consul."

93 "EXHIBIT AA.

Bremen, den 8. November 1916.

I, the undersigned lawyer and Notary Public, declare herewith that — of the following promissory notes, all issued and signed by the firm of Carl R. Heye on April 22nd 1914, in favor of

Messrs. Addix & Cordes.....	amounting	to	M	4,151.95
Addix & Will.....	"	"	"	2,141.30
H. Bischoff & Co.....	"	"	"	30,302.58
Boden & Haac.....	"	"	"	14,429.05
S. L. Cohn & Sohn.....	"	"	"	17,130.76
F. Dorfel, Prague.....	"	"	"	10,192.25
McFadden Bros. & Co.....	"	"	"	29,592.95
Gebruder Fritze & Co.....	"	"	"	5,722.75
Knoop & Fabarius.....	"	"	"	6,602.15
Lentz & Hirschfeld.....	"	"	"	5,495.51
Eduard Meyer & Co.....	"	"	"	2,467.10
Muller, Petzel & Co.....	"	"	"	11,025.47
Schmitz & Roessingh.....	"	"	"	8,129.60
Alex. Sprunt & Son.....	"	"	"	12,332.55
Totally amounting to.....			M	159,715.97

true copies of which have been taken and certified by me November last occasionally of forwarding the depositions of Mr. Oscar Polletin to the court of Sherman, Texas. The originals of the above stated notes are now before me and that they all were negotiable papers according to the law, which still now is and which was in force in Bremen in 1914.

Bremen 8. November 1916.

DR. VOIGT."

94 "EXHIBIT BB.

Bremen, den 8. November 1916.

I, the undersigned lawyer and Notary Public declare herewith the following:

"'EXHIBIT C C.'

Birge-Forbes Co., Sherman, Texas

19 To notes of arbitrations, received from the buyers in 1910/11 on shipments of the Birge-Forbes Co. until 19. IV. 1911 as per statement given to Sherman Texas, in different letters, amounting to — M 312749.30

M 312749.30

1 To balance of the claims of the buyers to the Birge-Forbes Co., due 19. IV. 1911, being: — M 192519.72

M	4884.65	from Addix & Cordes
"	2519.15	" Addix & Will
"	40268.68	" H. Bischoff & Co.
"	16975.35	" Boden & Haac
"	20153.86	" S. L. Cohn & Sohn
"	11990.85	" F. Dorfel, Prague
"	34815.25	" Mc. Fadden Bros & Co
"	6732.65	" Gebruder Fritze & Co
"	7767.25	" Knoop & Fabarius
"	6465.31	" Lentz & Hirschfeld
"	2902.45	" Eduard Meyer & Co
"	12971.12	" Muller, Petzel & Co
"	9564.25	" Schmitz & Roessingh
"	14504.90	" Alex. Sprunt & Son

M 192519.72 as above

M 192519.72

1 To balance of the claims of the buyers to the Birge-Forbes Co., due 19. IV. 1911 being: — M 159715.97

M	4151.95	from Addix & Cordes
"	2141.30	" Addix & Will
"	30302.58	" H. Bischoff & Co
"	14429.05	" Boden & Haac
"	17130.76	" S. L. Cohn & Sohn
"	10192.25	" F. Dorfel, Prague
"	29592.95	" Mc. Fadden Bros & Co
"	5722.75	" Gebruder Fritze & Co
"	6602.15	" Knoop & Fabarius
"	5495.51	" Lentz & Hirschfeld
"	2467.10	" Eduard Meyer & Co
"	11025.47	" Muller, Petzel & Co
"	8129.60	" Schmitz & Roessingh
"	12332.55	" Alex. Sprunt & Son

M 159715.97 as above

M 159715.97

"'EXHIBIT D D.'

Carl R. Heye — Claim account of Customers

2 To transfer from account Birge-Forbes Co., Sherman Texas—claim account of buyers consisting of 6 months' promissory notes, due October 22nd 1914, issued and signed by Carl R. Heye in favor of — M159715.97

Addix & Cordes	for M	4151.95
Addix & Will	" "	2141.30
H. Bischoff & Co.	"	30302.58
Boden & Haac	"	14429.05
S. L. Cohn & Sohn	"	17130.76
F. Dorfel, Prague	"	10192.25
Mc. Fadden Bros. & Co	"	29592.95
Gebruder Fritze & Co.	"	5722.75
Knoop & Fabarius	"	6602.15
Lentz & Hirschfeld	"	5495.51
Eduard Meyer & Co.	"	2467.10
Muller, Petzel & Co.	"	11025.47
Schmitz & Roessingh	"	8129.60
Alex. Sprunt & Son	"	12332.55

14 notes, amounting to — M 159715.97

M 159715.97

'EXHIBIT C C.'

Claim account of buyers. — Credit.

1911
April 19 By cash, paid by Carl H. Heye for the Birge-Forbes Co. to their buyers during season 1910/11 until 19. IV. 1911 amounting to — M 120229.58

Decbr. 30 By balance — " 192519.72

M 312749.30

1912
March 29 By cash, paid by Carl R. Heye for the Birge-Forbes co. to their buyers further being: — M 32803.75

M	732.70	for Addix & Cordes
"	377.85	" Addix & Will
"	9966.10	" H. Bischoff & Co.
"	2546.30	" Boden & Haac
"	3022.10	" S. L. Cohn & Sohn
"	1798.60	" F. Dorfel, Prague
"	5222.30	" Mc. Fadden Bros. & Co.
"	1009.90	" Gebruder Fritze & Co.
"	1165.10	" Knoop & Fabarius
"	969.80	" Lentz & Hirschfeld
"	426.35	" Eduard Meyer & Co.
"	1946.65	" Muller, Petzel & Co.
"	1434.65	" Schmitz & Roessingh
"	2176.35	" Alex. Sprunt & Son

M 32803.75 as above

Decbr 30 By balance — M 159715.97

M 192519.72

1914
April 22 By payment of Carl R. Heye in his 6 months' promissory notes thus squaring this account, notes being transferred to Carl R. Heye claim account re Birge-Forbes Co. amounting to: — M 159715.97

M	4151.95	in favor of		Addix & Cordes
"	2141.30	"	"	Addix & Will
"	30302.58	"	"	H. Bischoff & Co.
"	14429.05	"	"	Boden & Haac
"	17130.76	"	"	S. L. Cohn & Sohn
"	10192.25	"	"	F. Dorfel, Prague
"	29592.95	"	"	McFadden Bros & Co
"	5722.75	"	"	Gebruder, Fritze & Co
"	6602.15	"	"	Knoop & Fabarius
"	5495.51	"	"	Lentz & Hirschfeld
"	2467.10	"	"	Eduard Meyer & Co.
"	11025.47	"	"	Muller, Petzel & Co
"	8129.60	"	"	Schmitz & Roessingh
"	12332.55	"	"	Alex. Sprunt & Son

M 159715.97 as above

M 159715.97

'EXHIBIT D D.'

re Birge-Forbes Co. shipments. — Credit.

1914
May 6 By cash payment of Carl R. Heye to have the promissory notes surrendered being — M 149523.72

M	4151.95	for Addix & Cordes
"	2141.30	Addix & Will
"	30302.58	H. Bischoff & Co.
"	14429.05	Boden & Haac
"	17130.76	S. L. Cohn & Sohn
"	29592.95	Mc. Fadden Bros & Co.
"	5722.75	Gebruder Fritze & Co
"	6602.15	Knoop & Fabarius
"	5495.51	Lentz & Hirschfeld
"	2467.10	Eduard Meyer & Co
"	8129.60	Schmitz & Roessingh
"	12332.55	Alex. Sprunt & Son
"	11025.47	Muller, Petzel & Co.

M 149523.72 as above

May 6 By remittance to Prague to get the promissory note in favor of F. Dorfel, Prague surrendered — M 10192.25

M 159715.97

94 1/2

Mr. Carl R. Heye has laid before me his original promissory notes, all issued and signed on April 22nd, 1914, in favor of

Messrs. Addix & Cordes.....	amounting	to	M	4,151.95
Addix & Will.....	"	"	"	2,141.30
H. Bischoff & Co.....	"	"	"	30,302.58
Boden & Haac.....	"	"	"	14,429.05
S. L. Cohn & Sohn.....	"	"	"	17,130.76
F. Dorfel, Prague.....	"	"	"	10,192.25
McFadden Bros. & Co.....	"	"	"	29,592.95
Gebruder Fritze & Co.....	"	"	"	5,722.75
Knoop & Fabarius.....	"	"	"	6,602.15
Lentz & Hirschfeld.....	"	"	"	5,495.51
Eduard Meyer & Co.....	"	"	"	2,467.10
Muller, Petzel & Co.....	"	"	"	11,025.47
Schmitz & Roessingh.....	"	"	"	8,129.60
Alex Sprunt & Son.....	"	"	"	12,332.55
Totally amounting to.....				M159,715.97

true copies of which have been certified by me on November 18th, 1915.

He solemnly declared that the signature 'Carl R. Heye' has been made by him personally on each note.

The signature of Mr. Carl R. Heye is known to me personally, there is no doubt that the signatures 'Carl R. Heye' on above stated notes have been made by Mr. Heye himself.

Bremen, 8. November 1916.

DR. VOIGT."

(Here follows Exhibit CC, marked page 94½.)

95 "'EXHIBIT EE.'

Statement of Payments in Cash by Mr. Carl R. Heye.

Date of payment.	To parties		Amounts.
May 6th 1914	Addix & Cordes	Ms.	4,151.95
" " "	Addix & Will	"	2,141.30
" " "	H. Bischoff & Co	"	30,302.58
" " "	Boden & Haac	"	14,429.05
" " "	S. L. Cohn & Sohn	"	17,130.76
" " "	F. Dorfel, Prague	"	10,192.25
" " "	McFadden Bros. & Co	"	29,592.95
" " "	Gebruder Fritze & Co	"	5,722.75
" " "	Knoop & Fabarius	"	6,602.15
" " "	Lentz & Hirschfeld	"	5,495.51
" " "	Eduard Meyer & Co	"	2,467.10
" " "	Muller, Petzel & Co	"	11,025.47
" " "	Schmitz & Roessingh	"	8,129.60
" " "	Alex. Sprunt & Son	"	12,332.55
	Totally	Ms.	159,715.97"

96 *Commission Attached to Depositions of Carl R. Heye and Oscar Polletin.*

The commission attached to the interrogatories propounded to Carl R. Heye and Oscar Polletin is as follows:

"UNITED STATES OF AMERICA,
Eastern District of Texas:

In United States District Court, at Sherman.

The President of the United States of America to Consul of the United States, Bremen, Germany, Greeting:

We hereby authorize and require you, or either of you, to summon Oscar Polletin, Carl R. Heye, James Heye, W. Cordes, G. Will, Fritz Entholt, Paul Schmitz, Bernhard Cohn, H. L. Baron, Peter Lentz, L. Meyer-Hackstroh, Eduard Muller, Arnold Fritze, D. H. Lippitt and Alfred Koch, residents of Bremen, Germany, to come before you forthwith, and that you then and there take their answer, under oath, to the attached copy of direct and cross interrogatories; and that you return same, without delay, to the Clerk of this Court, herein provided:

1. That you reduce their answers so taken in writing in proper form, and cause the same to be subscribed and sworn to by said witnesses.

2. That you certify under your hand and seal of office, that said answers were sworn to and subscribed before you.

3. That you seal up in an envelope the answers so taken; together with the annexed interrogatories, and this Commission, with your name across the seal.

4. That you endorse on the envelope the name- of the parties to this suit, and the name- of said witnesses.

5. That you direct the package to the 'Clerk of the District Court of the United States for the Eastern District of Texas, at Sherman, Texas.'

97 6. That if said package is sent by mail, the postmaster or his deputy shall endorse thereon that he received it from your hands, and sign his name thereto; or if you entrust it to private conveyance, as provided by the Statute you will apprise the person receiving it that it must be delivered to this court by himself in person, which evidence, so taken as above, is to be used on the trial of a suit now pending in the said District Court of the United States at Sherman, in said State of Texas, wherein Carl R. Heye, — plaintiff, and The Birge-Forbes Company, defendant,

Herein fail not, but make return of this Writ as the law directs.

Witness the Honorable Gordon Russell, United States District Judge for the Eastern District of Texas, in said District, this 1st day of Sept., A. D. 1916, and of American Independence the 141st year.

[SEAL.] J. R. BLADES,
Clerk U. S. District E. D. T.,
By M. B. OSLIN, *Deputy.*"

Endorsements of Depositions of Carl R. Heye et al.

The envelope in which said depositions were transmitted to the Department of State at Washington by the officer taking the same bore the following endorsements and superscription:

On the face of the envelope was this language:

"In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. Law.

98 CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

Deposition of Carl R. Heye, witness.
Deposition of Oscar Polletin, witness.

I, Dr. jur. Robert Voigt, the officer before whom the within depositions were taken do hereby certify that I, in person, deposit this

package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission on this day.

Bremen, November 13th, 1916.

[SEAL.] R. VOIGT.

Received this package on the 13th day of November, 1916, from the hands of Dr. Jur. Robert Voigt, the officer before whom the depositions were taken, and forwarded same the 25th day of November in the Official Mail pouch to the Department of State, Washington, D. C., for transmission to the addressee.

[SEAL.] WILLIAM THOMAS FEE,
Consul of the United States of America,
Bremen, Germany.

Registered.

To the Clerk of the U. S. District Court, Sherman, Texas, U. S. A."

Stamped on the face of said envelope was this language:

"American Consular Service,

American Consulate,

Bremen, Germany."

99 On the back of said envelope appear five wax seals. Across two of the sealed flaps on the back of said envelope is written the name "William Thomas Fee." Across the other flap of the envelope is twice written, the name "Dr. Voigt."

On the face of said envelope endorsed thereon, after its receipt at Sherman, Texas, is this language:

"Received from the Postmaster at Sherman, Tex., on this Dec. 30, and filed on same date.

J. R. BLADES, *Clerk.*"

To the left of the endorsement just quoted appears this language:

"Opened at request of J. F. Holt, Atty. for Deft., this Dec. 30, 1916.

J. R. BLADES, *Clerk.*"

The envelope containing the depositions and bearing the endorsements and superscription above quoted came to the post office at Sherman in a larger white envelope containing the following stamps and superscription:

On the upper left hand corner "Department of State, U. S. A."

On the right hand upper corner "Department of State, Official Business, Penalty for private use $300.00."

And below the above "Registered, No. 896210."

In the center of the envelope appears: "The Clerk of the U. S. District Court, Sherman, Texas."

100 *Order of Court Overruling Motion to Quash Depositions of Carl R. Heye et al.*

The court after hearing and considering the motion to quash the depositions of Carl R. Heye and Oscar Polletin, overruled said motion in the following verbal opinion:

"In passing upon the question I must decide upon the proper effect to be given to the waiver and agreement signed by counsel for defendant in this case when the attempt was being made to take the depositions of the witnesses, Carl R. Heye and Oscar Polletin. I have not thought it necessary after investigation to base the ruling upon the construction to be given the statutes which have been read, but perhaps it may assist in throwing light upon the line of reasoning by which I reach the conclusion if I refer briefly to those Statutes. My attention has been called to Section 861, which reads as follows: 'The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided.'

Now I think the other statutes which have been read practically show that there are only two, possibly three, modes by which this rule laid down in Section 861 can be departed from in the taking of evidence to be used in court. Section 861 announcing practically the common law rule on the subject, those exceptions to it must be strictly construed. One of them is what is known as depositions de bene esse. There is no pretense that that mode was followed, because nothing connected with the procedure from its inception to its close shows any effort to follow article 863, which provided for the taking of depositions de bene esse. Subsequent sections of the statutes
101 define the occasions and provide the modes in which evidence may be presented in the trial of actions at common law in the courts of the United States. One of them is Section 866, known as the dedimus statute, and appears to have been passed for the purpose of enabling the court to authorize the taking of depositions in any case where the procurement of justice seemed to demand the taking of them. The article is in this language:

"In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus protestatum to take depositions according to common usage."

That is an enlargement of the power of the court where the circumstances did not exist to authorize the taking of depositions according to Section 863, by providing for other cases in which depositions may be taken.

It is contended here that this deposition was not taken under Article 866, known as the Dedimus Statute, because no application was made to the court. I think that is true. I hold that the deposition was not taken under that statute, because it required an application to the court, and in this case, no application was made.

The other section called to my attention is the Act of March 9, 1892, which provides that in addition to the mode of taking of depo-

sitions of witnesses in cases pending at law or in equity in the District or Circuit Courts of the United States, it is lawful to take depositions of witnesses in the mode provided by the laws of the State in which the courts are held. There seems to have been an effort to pursue the method provided in the Act of March, 1892, in
102 taking these depositions, and here as a matter of fact is what happened: The plaintiff in this case propounded the interrogatories to the witnesses. The defendant company by its attorneys propounded cross interrogatories to those witnesses, and upon those direct and cross interrogatories the depositions were taken, which depositions are now sought to be quashed. Plaintiff's attorneys at the conclusion of the interrogatories prepared an agreement which I am going to read:

"The notice, copy and issuance of commission are hereby waived, and it is agreed that any qualified officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories with the effect as if a commission had regularly issued."

That was the language as originally prepared. Now, it appears beyond controversy that that was submitted to attorneys for defendant and they struck out the following words and added the following words: In line one they eliminated the words "and issuance of commission," and in line two they erased the words "any qualified," in line four they erased the words "in like effect as if a," and then following the word "commission" in line five the words they struck out the words "had regularly issued." They added the word "but" in line four, and added after the word "commission" the words "is not waived," so that as changed the language was as follows:

"Time, notice and copy are hereby waived, and it is agreed that officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived."

To the interrogatories to the witness, Oscar Polletin, this is the language finally signed by counsel for defendant:

103 "Time, notice and copy are hereby waived, and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories."

The writing which in itself is scant, contains a waiver, and an agreement as well. I think I must consider it in the light of what happened at the time the agreement was made. Here was an effort by plaintiff's counsel to take the depositions of the witnesses, Heye and Polletin, in answer to the interrogatories then and there tendered to counsel for defendant. It must have been in the minds of all the parties that the purpose was to have Heye appear and answer these interrogatories, and such cross interrogatories as defendant's counsel might file. Defendant's counsel did file their cross interrogatories, after signing the agreement I have read. I must give that agreement its common sense construction, and that is that the proper officer might have these witnesses appear before him and answer the interrogatories and swear to them, and the officer transmit the answers to the court here, for that was evidently the purpose of counsel when

they signed the agreement and when the interrogatories and cross interrogatories were prepared. Time, notice and copy were waived; in fact everything was waived except the issuance of commission, and then follows the agreement which says that it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories. That was an agreement that they might take the answers and return the answers on those direct and cross interrogatories. The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be taken and used in court in
104 this trial as evidence. The parties had the power as well as the right to make this agreement and have it upheld by the court. They had the right to agree to an absolute final judgment in this case, and, of course, could agree to anything to the procedure leading up to the judgment.

That presents for decision before me the proposition as to whether the method in which the depositions were returned was fair and free from suspicion. It was a substantial compliance with the State Statute on the subject of the return of depositions, and seems to have been an effort to comply with it.

An inspection of the envelope in which these depositions were returned shows that the case was properly styled, and that the officer who took the depositions made this certificate:

"I, Dr. jur Robert Voigt, the officer before whom the within depositions were taken, do hereby certify that I, in person, deposit this package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission on this day.

Bremen, November 13th, 1916.

Signed with the signature of the officer and seal."

Following that is this certificate:

"Received this package on the 13th day of November, 1916, from the hands of Dr. jur Robt. Voigt, the officer before whom the depositions were taken, and forwarded same the 25th day of November, in the official mail pouch to the Department of State, Washington, D. C. for further transmission to the addressee.

WILLIAM THOMAS FEE,
Consul of the United States of America, Bremen, Germany."

105 I have before me as a part of the record this envelope which bears the words "Department of State, U. S. A.," and shows by endorsement on it that it came by registered mail and that it was directed to the clerk of United States District Court, Sherman, Texas. I can only infer that the envelope containing the depositions, with the certificates I have read, reached here in the white envelope which bears the evidences of having been sent here by the Department of State of the United States of America. I have before me the clerk's certificate endorsed on the envelope containing the depositions that he received the same from the Post Office at Sherman on the 30th

day of December, 1916, and that it was opened at the request of the attorneys for the defendant. I hold that under the circumstances which I am bound to consider in connection with the taking and returning of these depositions, and the conditions which prevail in reference to the method by which mail and intelligence can be transmitted under the conditions produced by the great war, the method of taking and returning the depositions was a substantial compliance with the law, and a sufficient compliance in the light of the agreement made; that the manner of taking and returning the depositions is free from suspicion of unfairness, and I therefore overrule the motion to quash."

To the action of the court in overruling the motion to quash, herein above set out, the defendant in open court duly excepted, and still excepts, and in this behalf tenders its bill of exceptions.

The plaintiff introduced in evidence the original petition filed by the plaintiff in the case of Carl R. Heye v. Birge-Forbes Company, number 156 law, in the United States District Court for the
106 Eastern District of Texas at Sherman, as follows:

"To the Honorable Judges of said Court:

Carl R. Heye, plaintiff, complaining of the Birge-Forbes Company, defendant, represents to the court:

That plaintiff is a resident of the city of Bremen, Germany, and is a citizen of the German Empire; that defendant is a corporation duly incorporated and existing under and by virtue of laws of the state of Texas; that defendant has its domicile and principal office and place of business in the City of Sherman in Grayson County in said Eastern District of Texas, and its president, N. B. Birge, and its secretary, N. A. Birge, reside in said County of Grayson; and that defendant is a citizen of the State of Texas and an inhabitant of the Eastern District of said state.

That about November 1st, 1901, defendant, which was then and still is engaged in the business of buying, selling and exporting cotton, made a contract and arrangement with plaintiff, who was then and still is a cotton broker in Bremen, Germany, wherein and whereby defendant appointed plaintiff as its selling agent in said City of Bremen, to make sales of cotton for it in said city. That said parties continued to act and to deal with one another under said contract and said arrangement until about May 1st, 1911. That said contract and arrangement remained practically the same throughout the course of dealings of said parties with one another, but it was more specifically defined and explained from time to time prior to October 1st, 1910, by letters and communications between said parties. That during October, 1910, and during all the time subsequent to said month until about May 1st, 1911, plaintiff and de-
107 fendant were acting, operating and transacting business with one another under and in pursuance of said contract and arrangement as so defined and explained. That it was a part of said contract and arrangement as so defined and explained and as mutually understood and acted upon by both parties that all cotton offered

by defendant for sale through plaintiff was to be even running cotton, of good color and staple; that all sales were to be made subject to and to be governed by Bremen class and arbitration; and that all sales were to be made subject to and to be governed by the rules of the Bremen Cotton Exchange.

That acting under and in accordance with the aforesaid contract and arrangement, plaintiff made sundry sales for defendant, at Bremen, Germany, of large quantities of cotton during the time intervening between about Oct. 1st, 1910, and about May 1st, 1911, such sales being made to a number of different buyers, that the buyers of said cotton purchased the same under the rules of the Bremen Cotton Exchange and subject to Bremen class and arbitration. That the rules of the Bremen Cotton Exchange required all disputes and controversies between seller and buyer as to the staple, class, grade or quality of cotton sold to be conclusively determined and settled by means of arbitration, and procedure in such arbitration proceedings being fully defined and set forth in the published rules of said Bremen Cotton Exchange.

That in the sales of cotton last aforesaid, made by plaintiff for defendant, disputes and controversies did arise between the seller and the buyers as to the staple, class, and quality of the cotton sold. That
108 the buyers of said cotton made claim that the cotton delivered to them was not up to the staple, quality and description offered by defendant, and upon which the price was based, and that the cotton delivered was not in compliance with the contracts of sale whereupon such claims, disputes and controversies were duly and regularly submitted to arbitration under and in accordance with the rules of the Bremen Cotton Exchange, the final result of such arbitrations being that awards or allowances aggregating the sum of, to-wit, 312,749.30 German marks, equivalent to about $74,334.33, were made in favor of said purchasers on their claims against defendant.

That in such arbitration proceedings plaintiff represented the interests of defendant, as his authority and duty required, and obtained for it the best results that were in his power or that were practicable. That said arbitration proceedings were in all respects regular, and the awards or allowances aforesaid were made in good faith. The defendant was duly, legally, promptly and within the time prescribed by the rules and customs of the Bremen Cotton Exchange, notified of the pendency of such arbitration proceedings and also of the results of same upon their termination.

That upon the final termination of said arbitrations, plaintiff, by virtue of his aforesaid contract and arrangement with defendant and under the rules of said Bremen Cotton Exchange, became bound and legally liable to pay at once to said purchasers the said awards or allowances made to them by the arbitrators. That shortly after the termination of said arbitrations plaintiff paid out on said award or allowances the sum of, to-wit, $30,000.00, and still owes and will
109 have to pay the further sum of, to-wit, $44,334.33. That by the aforesaid contract and arrangement between plaintiff and defendant and by the custom and course of business be-

tween them and by the rules of the Bremen Cotton Exchange, defendant became liable and promised plaintiff to pay to him immediately upon the termination of said arbitrations, or else upon demand, the said sum of, to-wit, $74,334.33 in order to protect and indemnify plaintiff against any loss by reason of his liability to the purchasers of the cotton.

That in addition to the sum aforesaid, defendant is justly indebted to plaintiff in the further sum of, to-wit, 7232.04 German marks, or $1,730.16 for losses and deficiencies in weights of cotton handled by plaintiff for defendant, insurance premiums on such cotton, overtare on such cotton, cable fees for tolls and other like expenses necessarily incurred by plaintiff on defendant's account and for its benefit during the period of time hereinbefore last mentioned. That it was a part of said contract and arrangement between plaintiff and defendant that the latter was to protect the former against all such expenses and reimburse him therefor upon demand.

The plaintiff has often demanded said sums of money of defendant, but the latter has failed and refused and still fails and refuses to pay the same or any part thereof, to plaintiff's damage in the sum of $85,000.00.

Wherefore, plaintiff prays that defendant be cited to answer this petition; that he have judgment against defendant for his debt and damages aforesaid, with six per cent per annum interest thereon from the time the monies became due and costs of suit; and that he have all other appropriate relief."

110 The above petition was filed November 17th, 1911.

When the above petition was offered to be read in evidence by the plaintiff the defendant objected to its introduction for any purpose except to explain what was in controversy in the suit in which said petition was filed, whereupon counsel for plaintiff stated to the court that he offered said petition for the purpose of supporting his plea of res adjudicata and to show the issues and controversies in the suit in which said petition was filed, and the court stated that it was admitted for that purpose.

Plaintiff introduced in evidence the first amended answer of the defendant in said cause number 156, which was filed January 6th, 1913, as follows:

"The defendant, obtaining leave of the court, files this its amended answer, amending its original answer filed herein on the — day of January, A. D. 1912, as follows:

I.

The defendant excepts to plaintiff's original petition filed herein for the reason that the same is insufficient in law and of this it prays the judgment of the court.

II.

For answer the defendant denies each and every allegation in said petition contained and demands strict proof of the same and of this it puts itself upon the country.

III.

Further and specially answering, the defendant avers:

On and prior to the 21st day of August, 1918, and subse-
111 quent to that date until about the — day of —, 1911, the plaintiff was the agent of the defendant to sell cotton in the market at Bremen, Germany, and as such agent, it was the duty of the plaintiff to, amongst other things, sell cotton for the defendant strictly on terms and conditions named and offered by the defendant and to do and perform such other things for the defendant as shall hereinafter be more fully stated.

On said date, the defendant wrote to the plaintiff a letter as its agent aforesaid containing the terms of all sales which he was thereafter to make, with respect to the differences which must apply to all arbitrations thereafter made on any cotton sold by the plaintiff for the defendant, a substantial copy of which said letter is attached hereto, marked 'Exhibit A' and is made a part hereof, which instructions were exchanged during the continuance of his agency.

By the expression in said letter reading:

'We would like to have all sales made with the understanding that arbitration differences for grade and staple will be those in effect (the actual differences made on cif and six cotton sold by us) at the time of the sale instead of the last day of landing,' was meant and was well understood by plaintiff to mean, that thereafter in all sales of cotton made by him for defendant that it must be distinctly understood that the differences in grade and staple to be adopted and applied by arbitrators must not only be actual differences as distinguished from certain arbitrary and fictitious differences, but must be those actual differences which were made on cif and six cotton sold by the defendant as evidenced by offers existing on dates
112 of sale, to the defendant or on cotton sold by defendant. The defendant would not sell cotton to the plaintiff on said market on any other terms.

In accordance with the instructions contained in said letter, and to comply therewith, thereafter all sales made by the plaintiff for the defendant were made on those terms and subject to such conditions, and to express the condition of said letter shown above, in each sale note or contract of sale, a provision was inserted reading, in substance, as follows:

'Any arbitration to be based upon the same grade and staple differences in force on date of contract.'

It was intended by the expression 'same grade and staple differences in force on date of contract' to express the condition above required by defendant of plaintiff in all its sales, that is to say, that in any arbitration had on any of the cottons so sold, the arbitrators must adopt and apply those actual differences, and those only, which were made on cif and six cotton sold by the defendant in force on date of contract and that any arbitration at Bremen must be expressly subject to that condition. It was so understood and intended by the plaintiff and the defendant as well as the buyers.

That plaintiff did not insert in said sale notes the clause above shown in parenthesis, but said clause was used in said letter to plainly indicate to the plaintiff exactly what differences were to be applied by the arbitrators and was and is explanatory of the other parts of the letter shown and plaintiff so understood the same. If it was not omitted from the sale notes under the belief that the provision quoted was sufficient to express the condition of said instructions as herein stated, then the same was omitted therefrom through error, mistake, or fraud of the plaintiff, but whatever the pur-
113 pose, at all times the plaintiff fully understood that said sales were so made and that said provision was inserted therein for the purpose herein stated and meant as herein alleged.

Among the rules of the Bremen Cotton Exchange governing arbitrations on quality and classing, is one reading in substance as follows, correctly translated into English:

'The arbitrations and classing shall be done on one set of samples drawn jointly by buyer and seller which shall be sent in a properly sealed condition to the Cotton Samples Room:

The note of instructions accompanying these samples shall state:

1. Owner of samples,
2. If the samples are only to be classed or,
3. If to be arbitrated, on what conditions.

The samples shall be dressed in the Cotton Sample Room' (sec. 23, Div. 111).

It was the duty of the plaintiff as defendant's agent to see that the note of instructions which accompanied the samples of cotton to be arbitrated clearly and fully stated the conditions upon which the cotton samples were to be arbitrated which required that he state what differences were to be adopted by the arbitrators and applied on said cottons as to grade and staple as hereinbefore explained. If the plaintiff furnished such a note of instructions as his duty required that he furnish, then said pretended arbitrations alleged by the plaintiff, if there has been any arbitration whatever, which is not admitted, are entirely void for the reason that the arbitrators did not pass upon the matters embraced within the submission. They
114 did not apply those actual differences made on cif and six cottons sold by the defendant as before explained, nor did they find or determine what such differences were, but, in lieu thereof, adopted and applied other and different differences which were not within the submission, not within the contracts of sale and not within the controversy of the parties thereto and which differences so adopted are entirely arbitrary, fictitious and do not in fact exist, and are adopted for the sole purpose of favoring foreign cotton buyers in controversy with American shippers and do not govern in the actual sale of spot cottons in any market and it was to contract against the application of these very differences that the instructions to the plaintiff contained in the letter of August 21st, 1908, were given and that said provision was inserted in the sale notes. Such differences so adopted are grossly excessive, and far in excess of the actual differences then existing in

the market for cif and six cotton, all of which the plaintiff knew at all times.

The defendant relied upon the plaintiff as its agent aforesaid to see that a proper note of instructions accompanied said samples, as it was his duty as such agent to see was furnished and it was his duty as such agent to see that such note of instructions clearly state for the guidance of the arbitrators, and as an exceedingly important condition of the arbitration what differences were to be applied by them and that they apply the differences so contracted to be applied by them as has hereinbefore been fully explained, and if he did not do this, then he wholly and negligently if not wilfully failed to perform his plain duty as the defendant's agent because, if he had done so, then the arbitrators would have ascertained and applied the differences contemplated in the said sales as before alleged,
115 and if there had been any award whatever, which is not admitted, the same would have been very materially different and less than those in the pretended arbitrations and pretended awards alleged to have been made, and if he was paid any sums whatever by reason of such awards, which is not admitted but denied, such disbursements were unreasonable, unnecessary, upon entirely void awards, made in plain violation of his instructions and in wilful disregard of the same and occasioned by his own negligence and made in excess of his authority as defendant's agent.

Nor is the grade and staple of any of said cotton determined by said pretended arbitrations, nor do the same show how many bales of any particular grade there were in each lot arbitrated and all are too vague, indefinite and uncertain to determine the grade and staple of said cottons pretended to have been arbitrated.

The plaintiff fully realizing and admitting that each and all of the foregoing allegations are true, on the 27th day of January, A. D. 1911, in writing agreed to waive, set aside and entirely disregard each and all of said pretended arbitrations and awards and to that end and for that purpose he and the defendant entered into a new contract whereby and wherein, in substance, it was agreed that all said pretended awards be set aside, disregarded, and waived, and that the remainder of said cottons, to-wit, about 5000 bales, be arbitrated in Liverpool by each party selecting an arbitrator and if these two could not agree, they to select a third or umpire whose agreement was to be final, and it was agreed that the average allowances if any made, on the cotton so arbitrated was to be applied to the
116 cottons formerly attempted to be arbitrated but which awards had been, by the agreement, set aside, waived and disregarded. The differences which were to be applied to the grades and staple under this last arbitration provided for were, substantially if not exactly, the same as those differences provided for in the instructions of the letter of August 21, 1908, and which should have been applied in said pretended arbitration as before alleged. A substantially correct copy of said agreement is hereto attached, marked 'Exhibit B' and is made a part of this answer.

Each party proceeded to act on the last named agreement and the defendant was always ready and willing to arbitrate thereunder, and

each party appointed an arbitrator as therein provided for, the plaintiff appointing one H. B. Porter. Very soon after appointing an arbitrator thereunder the plaintiff began a persistent effort to induce the arbitrator selected by him, if not both arbitrators, to assume a partisan attitude in his favor and began to inform him of the results of said pretended arbitrations and disregarded and waived awards and trying to induce him to contend for even greater allowances if he would not do this, then to sign an affidavit which he had prepared holding that the last named was inoperative, even offering him 50 guineas, equivalent to $250.00, to so hold.

Wherefore, defendant prays that plaintiff take nothing by this suit, and that it recover its costs."

Plaintiff introduced in evidence the exhibits attached to defendant's amended answer above set out, said exhibits being as follows:

117 "EXHIBIT A."

Sherman, Texas, Aug. 21st, 1908.

Mr. C. R. Heye, Bremen, Germany.

DEAR SIR: Replying to yours of the 3rd inst., as you seem to think you will be able to do a large business for us and as our relations have always been pleasant, we will drop the question of reducing expenses by employing an agent for the present and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grade and staple shall be those in effect (the actual differences made on cif and six cotton sold by us) at the time of sale instead of the last day of landing.

Yours truly,

THE BIRGE-FORBES COMPANY."

"EXHIBIT B.

This agreement made and entered into this the 27th day of January, A. D. 1911, at Sherman, Texas, by and between the Birge-Forbes Company, of Sherman, Texas, a corporation duly organized under the laws of the state of Texas, hereinafter called first party, and Carl R. Heye, a resident, of Bremen, Germany, hereinafter called second party.

Witnesseth:

That whereas, first party has shipped 15500 bales of cotton during the current season, and,

Whereas, the first party is dissatisfied with the allowances heretofore made by the Bremen Board of Arbitration on such of
118 this cotton, as has been arbitrated, to-wit, about ten thousand bales, and,

Whereas, both parties are willing that the balance of the cotton shall be arbitrated in a different manner:

Now, Therefore, it is mutually agreed, for a valuable considera-

tion, that the first party appoint a man in Liverpool, England, as its arbitrator and the second party appoint a man in Liverpool, England, as his arbitrator, these two arbitrators to attempt to arbitrate the balance of the cotton not yet arbitrated; if these two arbitrators can agree, their decision to be final. If they cannot agree, they are to appoint a third arbitrator, to be agreed upon by them and his decision is to control and be final. First samples of the cotton to be arbitrated, the said samples to be properly drawn in the persence of, and under the supervision of a comptroller to be named by first party, or to be forwarded direct to the Liverpool arbitrator.

It is understood and agreed that the average allowances reached by the Liverpool arbitrators is to be applied as the average allowance to be paid on the cotton previously arbitrated in Bremen, Germany; that is to say, that the average amount allowed per pound on the cotton arbitrated by the Liverpool arbitrators is to be multiplied by the total amount of net landing pounds shipped by first party to or through second party during the present cotton season, and the amount thus reached shall be the allowance to be paid by first party.

The allowances made by the Liverpool arbitrators are to be paid by first party immediately on receipt of each claim as allowed by them.

119 The differences to govern in the arbitration of this cotton are to be one-sixteenth (1/16d) of a penny per pound between half grades, that is, between Fully Good Middling and Good Middling, or between Good Middling and Fully Middling, and the actual differences between the various staples that the Liverpool buyers were paying first party and other American shippers on dates of sales for cif and 6% cotton.

The Liverpool arbitrators are to determine what the actual differences were that was actually paid by Liverpool buyers to first party and other American Shippers for C. I. F. and 6% cotton on date of sale.

The cotton is to be arbitrated on the same grade and staple descriptions as sold by first party.

Witness our signatures the day and year first above written.

(Signed) THE BIRGE-FORBES CO.,
By N. B. BIRGE, *Prest.*

Attest:
M. C. DORSET, *Treas.*

Second Party,

CARL R. HEYE,
By C. KAUFMAN.

Witness:
A. B. SAUL."

When the defendant's answer and the exhibits attached thereto were introduced in evidence by plaintiff, plaintiff's counsel stated that the same were offered for the sole purpose of showing what the

issues were in that case and in order to support the plaintiff's plea of res adjudicata.

120 For the same purpose plaintiff introduced in evidence plaintiff's first supplemental petition in cause number 156 Carl R. Heye, vs. The Birge-Forbes Company, filed in this court April 14th, 1913, as follows:

"Now comes the plaintiff, Carl R. Heye, and by leave of court files this his first supplemental petition in the above entitled cause and in reply to defendant's first amended original answer filed herein says:

I.

He denies all and singular the allegations in said answer and demands strict proof of same.

II.

He specially denies that he violated or disregarded or failed to perform any duty he owed defendant under the contract between them or under any instructions that defendant may have had the right to give and did give to plaintiff, plaintiff received the letter copied as Exhibit 'A' to defendant's amended answer, but in good faith interpreted and acted on the same as not intended to direct or request any change in the basis or manner of future arbitrations except to substitute the date of sale for the last day of landing as the time for the application of the difference for grade and staple. Not only did plaintiff so interpret and understand and act on said letter, but defendant, with full knowledge and means of knowledge that plaintiff was so doing, acquiesced in such interpretation and did not protest against, but consented to, the way and manner in which plaintiff was conducting and continued to conduct the business of his agency for defendant. Plaintiff, with defendant's knowledge, acquiescence, ratification and approval, continued in good

121 faith to act on his aforesaid understanding of said letter during the entire cotton seasons of 1908-1909 and 1909-1910, and until after all the arbitrations made the basis of this suit had been completed and plaintiff's liabilities to the buyers concerned in such arbitrations had accrued. From time to time, beginning shortly after the sending of said letter of August 21st, 1908, and continuing through the cotton seasons of 1908-1909 and 1909-1910, many arbitrations were made of cottons sold by plaintiff for defendant on the Bremen market on the same terms as existed in the sales concerned in this suit, which said arbitrations were conducted upon the same basis and conditions and in the same manner as the arbitrations involved in this suit, of all which facts defendant had full knowledge and ample means of knowledge concurrently with the transactions referred to. Defendant acquiesced in and ratified said transactions and paid the awards given against him in such arbitrations. Said conduct of defendant was well calculated to, and did, cause plaintiff to believe (and to act on such belief) that his aforesaid interpretation of said letter was in harmony with defend-

ant's purpose and intention and was approved by defendant. Wherefore, defendant is estopped to deny that plaintiff correctly interpreted said letter or to claim that any unauthorized basis for differences was applied in the arbitrations concerned in this suit. Plaintiff further says that as a matter of fact his interpretation of said letter was correct and that the contention defendant now makes with respect to the purpose and effect of said letter is an after thought that originated subsequent to the filing of this suit.

122 III.

Plaintiff says he executed the agreement copies in substance as Exhibit 'B' to defendant's answer, but he denies that the arbitration awards made the basis of this suit have ever been waived or in any manner set aside or their validity in any way impaired. Said agreement, so far as concerns the cottons arbitrated at Bremen and concerned in this suit, proved to be impossible of performance in that it required the Liverpool arbitrators to arbitrate on the same grade and staple descriptions that the cotton concerned in this suit were sold upon in the Bremen market and in proceedings with their arbitrations to apply the differences that were actually made for cif and six per cent cotton on the Liverpool market by buyers from Birge-Forbes Company and other American shippers on the very dates of the Bremen sales concerned in this suit, whereas after said agreement was made the fact developed that on the dates in question there were no transactions at Liverpool in the grade and staples of cotton to which the arbitrators were limited and hence that no basis existed upon which the Liverpool arbitrators could proceed; and consequently the arbitrators refused to proceed with the arbitration. Plaintiff in good faith made every possible effort to have said agreement fully and fairly carried out and performed, and would have waived the benefit of the Bremen awards if and when arbitrations by the Liverpool arbitrators had been made. But the object, purpose and consideration of the agreement for arbitration of this cotton at Liverpool wholly failed as above stated, whereby said agreement for arbitration became of no effect and the Bremen awards remained and now are in full force and effect.

123 Wherefore, plaintiff prays judgment against defendant as prayed in his original petition."

Plaintiff for the same purpose introduced in evidence the defendant's first supplemental answer filed in said cause number 156, on April 26th, 1913, as follows:

"The defendant, after obtaining leave of court, filed this its first supplemental answer in reply to the plaintiff's first supplemental petition filed herein on the — day of April, 1913, as follows:

I.

The defendant excepts to said petition for the reason that the same is wholly insufficient in law and of this it prays the judgment of the court.

II.

For answer, the defendant denies each and every allegation therein contained and demands strict proof and of this it puts itself upon the country.

III.

Further and specially answering, the defendant avers:

I.

It is not true, as alleged in said petition, that it was only the purpose of the instructions of the letter of date August 21st, 1908, to change the basis of arbitration to the Bremen differences existing on the date of the sales instead of the last day of the landing, nor are said instructions capable of such construction or interpretation. Such was not the meaning thereof so far as defendant is concerned and the plaintiff well knew at all times the defendant did not intend
124 for such instructions to have the limited meaning now contended for by the plaintiff and it expressly denies that he in good faith placed such interpretation upon said letter, if he placed such interpretation thereon, which defendant denies. Such interpretation and construction could not be placed thereon without entirely ignoring the expression in said letter 'the actual differences made on cif and 6 cotton sold by us' which was placed in said letter to plainly indicate which differences were to be adopted and applied and which the plaintiff well knew and understood.

If the plaintiff placed such an interpretation upon said letter, which the defendant again denies, he kept such interpretation a secret to himself until the filing of said supplemental petition in this case and the defendant never knew of such a pretended interpretation thereof until said time but the plaintiff at all times, after said instructions, sold the cotton for defendant under said terms and with the clause shown in defendant's amended answer in all the 'sales notes' and placed therein to indicate the differences applying. He never, at any time, informed the defendant that the 'differences' used in said sales notes were other than the actual differences required by his said instructions nor was any objections whatever made by him to said terms and, if said provision was not inserted in the sales notes for the purpose alleged by the defendant, then the same were placed therein purposely leaving off anything to expressly denote 'actual' differences as explained for the purpose of deceiving the defendant and causing the defendant to believe he was strictly obeying the instructions of said letter of August 21st, 1908.

125 If there were any subsequent arbitrations paid by the defendant based on Bremen differences instead of the actual cif and 6 differences, as alleged by the plaintiff, the defendant denies that it knew, at the time the same were paid, that actual cif and 6 differences were not applied instead of Bremen differences. At all said time, the plaintiff was the agent of the defendant at Bremen and it was his duty, amongst other things, to see that defendant's interests were fully protected in all said arbitrations and the defendant believed that the plaintiff was looking after its interest in such arbitrations as his duty required and it did not know until after this suit was filed, that the plaintiff had not furnished 'notes of instructions' with the different arbitrations fully informing the arbitrators that the actual cif and 6, instead of Bremen, differences were to apply but believed that same had been done and, if the allegations of said petition are true, the defendant has made payment of arbitration awards which it was not under obligation to pay, but were paid relying on the plaintiff's protection of defendant's rights, which he did not do.

As soon as the defendant was advised by the plaintiff that the differences required by his instructions were not being applied it refused to make any further payment of such pretended arbitrations.

II.

There was absolutely nothing to prevent the arbitration provided for in the contract of date, January 17th, 1911, being had, save and except the plaintiff himself as is fully shown in defendant's amended answer. It denies that said cotton could not be arbitrated at
126 Liverpool, under said agreement, using the same grade and staple descriptions used in said sales.

In both Liverpool and Bremen markets, the same descriptive terms are employed to designate the grades of cotton, cut generally, but not always, different terms are used to designate the staples. Bremen generally uses what is known as millimetre terms while Liverpool generally, but not always, uses what is called English inches. Whichever term is used has its substantial, if not exact, equivalent in the other. In the sales in controversy, millimetre terms were used descriptive of staples, part of it being what is called 20 millimetre cottons, while part of it was 29-30 millimetre. Thirty millimetre cotton has its substantial, if not exact equivalent in Liverpool in what is called, in that market, 'full inch and 1-8 to 3-16' and is worth exactly the same while 29-30 millimetre cotton has its substantial, if not exact, equivalent in what is called the Liverpool market, 'inch and 1-8 to 3-16' and is worth exactly the same. In other words, had this cotton been sold to Liverpool buyers instead of Bremen buyers, and the term 'inches' used to denote staples instead of Millimetre, it would have been sold as 'full inch and 1-8 to 3-16' and 'inch and 1-8 to 3-16' respectively, and would have sold for exactly the same prices. Therefore, there was absolutely nothing whatever to have prevented the Liverpool arbitrators reducing the millimetre terms to English

inches and applying the differences using millimetre terms in their decision.

It denies that on the dates mentioned or referred to that there were no transactions in Liverpool in the grades and staples corresponding with those in controversy, but avers that there were many
127 thousands of bales sold on said market on said dates, of American cotton. If millimetre terms were not used descriptive of staple, then its equivalent was used in inch terms and there was nothing to have prevented the arbitrators, by the process above outlined, ascertaining and applying the proper differences and rendering their decision.

Wherefore, defendant prays that plaintiff take nothing by this suit."

Plaintiff for the same purpose introduced in evidence the verbal charge of the court to the jury in cause number 156, Carl R. Heye v. The Birge-Forbes Company, delivered to the jury in said cause May 23rd, 1913, as follows:

GENTLEMEN: The court has concluded, after hearing the argument of counsel in the cause, that it becomes my duty to direct a verdict. By so doing, of course I will relieve the jury of a very large amount of labor in going over the voluminous testimony and reaching such conclusion as you might reach from investigating the facts. I take this action in the case because I believe the whole case turns on questions of law which are for the decision of the court. For that reason I feel that I should direct the character of verdict you return, indicating the amount you should find in the case. In doing so, it may not be improper to make a very brief statement of the character and nature of the suit.

This case was filed by the plaintiff, Carl R. Heye, based upon the claim that he had paid out something over seventy-six thousand dollars, or had become liable for that sum of money, on account of certain findings of the Bremen Board of Arbitration of the
128 Bremen Cotton Exchange in ascertaining the differences in the staple, grade and quantity of certain cottons sold by him as the agent of the defendant company on the Bremen market. *The* claims that he acted as the agent of the defendant company, and made sales of cotton between the 1st of October, 1910, and May 1, 1911. He alleges that it was agreed that the cotton he sold as the agent of the defendant company was to be sold under the rules of the Bremen Cotton Exchange, and, among those rules, was a stipulation that all differences as to grade and quality were to be arbitrated by the Board of Arbitrators provided for by the rules which have been introduced in evidence in this case. He claims that between the dates I have indicated, viz: October 1, 1910, and May 1, 1911, something over fifteen thousand bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and, after the sales were made, reclamations were made by those buyers, and disputes and controversies arose as to the quality,

grade and staple of the cotton, and that those disputes and controversies, under the rules of the Bremen Cotton Exchange, were submitted to the Board of Arbitrators; that those arbitrators acted in accordance with the rules of the Bremen Cotton Exchange and made their award; that thereafter that award was appealed from to the Board of Appeal, also provided for by the rules of the Bremen Cotton Exchange, and the Board of Appeal made its award, and that by virtue of these rules and these awards, he became liable to the buyers of the cotton in about the sum of $74,333.33. He alleges that, in addition to this item of award, he paid out on the cotton so sold for the defendant company the sum of $1,730.16 for losses and deficiencies
129 in the weight of the cotton. As far as the latter sum, $1,730.16 is concerned, which the plaintiff alleges that he paid out for losses and deficiencies in the weight of the cotton, there is no controversy whatever in the testimony. The plaintiff alleges that he paid those amounts, and there is no testimony in behalf of the defendant company contradicting the evidence of the plaintiff on that point. Therefore, it would be my duty to instruct you to render a verdict for the plaintiff, Heye, for the sum of $1,730.16, being the amount of losses and deficiencies in the weights of the cotton in controversy in this suit.

As to the other part of the controversy, the defendant, Birge-Forbes Company, claims that it is not liable to the plaintiff for the amount of the awards for the reasons set out in its amended original answer filed in this case January 6, 1913. Without attempting to make an elaborate statement of the reasons set out in the answer the defense revolves around two propositions named in that answer. One of them is that the plaintiff, Heye, can not recover on the awards made by the Bremen Board of Arbitration, for the reason that on the 27th day of January, 1911, the findings of the Bremen Board of Arbitration were set aside and annulled by an agreement made between the parties to this suit on that date. The defendant alleges that it became dissatisfied with the findings of the Bremen Board of Arbitration, and that there were various negotiations between the defendant company and the plaintiff, Carl R. Heye, prior to the 27th of January, 1911, which culminated on that date in the agreement which has been read in evidence, and which is attached as an exhibit to the answer of the defendant company, and the defendant company claims that that agreement amounted in law to a
130 setting aside and annulling of the findings of the Bremen Board of Arbitration.

It is in evidence that the agreement of January 27, 1911, was never carried out. The arbitrators who were agreed upon in that agreement of January 27, 1911, refused to act because of the fact, as is alleged that they claimed that there was not sufficient data upon which they could reach a conclusion at Liverpool, the place where the arbitration provided for in the agreement was to occur.

There was some testimony one way and the other as to whether the plaintiff or the defendant company was charg-able with the blame for not carrying out the agreement of the 27th of January, 1911, but I do not believe there is any testimony sufficient upon

which to base a finding that either the plaintiff or the defendant company was at fault for failing to carry out that agreement. In other words, it was an agreement attempted to be made to arbitrate which was never executed, and this through no fault of either of them as the court believes from the testimony.

The question for the court to decide is whether the agreement of January 27, 1911, amounted to an abandonment and annulment of the findings of the Board of Arbitration and the Appeal Board of Arbitration.

The court has come to the conclusion in this case that the plaintiff's cause of action rests upon the finding of the Board of Arbitration provided for by the rules of the Bremen Cotton Exchange; that that finding by the Board of Arbitration constituted his cause of action. If the Bremen Board of Arbitration had found nothing in favor of the parties to whom the cotton was sold, and who have claims
131 for reclamation, then plaintiff would have nothing to pay, and would have no cause of action against the defendant, so that the basis of this suit which constitutes his cause of action is that he had been compelled under the rules of the Bremen Cotton Exchange to pay out certain sums found against the defendant Company by the Board of Arbitration of that Cotton Exchange.

Now, when for any reason the agreement of January 27, 1911, failed to become operative, it remitted the plaintiff to his original cause of action which was the finding of the Bremen Board of Arbitration, and upon that he sues, and therefore the court is of opinion that the agreement of January 27, 1911, while it would have been effective, if it had been carried out, but not having been carried out, and without the fault of either party, the plaintiff was remitted to his original cause of action, which is the finding of the Board of Arbitration of the Bremen Cotton Exchange.

The other proposition that was raised was that the rules of the Bremen Cotton Exchange were modified by the instructions given by the defendant company on the 21st of August, 1908, together with the reply thereto made by the plaintiff on the 14th of December, 1908, and that the record may be as complete as possible on this particular phase of the case, I call the attention of the jury to the statements contained in the letter which the defendant company wrote to the plaintiff on the 21st of August, 1908, and which letter I quote in full as follows:

'Replying to yours of the 3rd inst., as you seem to think you will be able to do a large business for us, and as our relations have always been very pleasant, we will drop the question of reducing
132 expenses by employing an agent for the present, and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grade and staple will be those in effect (the actual differences made on cif and six cotton sold by us) at the time of the sale instead of the last day of landing.'

The defendant company had the right to engraft that change on the rules of the Bremen Cotton Exchange so far as the liabilities and

obligations of the plaintiff in this case were concerned, if the proposition in that letter matured into a contract—that is, if the minds of the parties met as to that particular phase which the defendant company sought to engraft on the rules of the Bremen Cotton Exchange; so that the court must look to the testimony in the record to determine whether the minds of the parties met and agreed upon any change of the rules of the Bremen Cotton Exchange. Now, the letter of the defendant company of August 21, 1908, reached the plaintiff, and on September 14, 1908, the plaintiff replied to it, and I now quote his reply:

'Thanking you for your favor of August 21, I am glad to note that you are willing to continue our agreeable relations and beg to assure you once more I always shall use all ability and activity to push business, and to make same as extensive and satisfactory as possible.

I note you wish it to be understood that all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future. However, I find it necessary to mention I fear we
132 often shall meet some objections as to this condition, for Bremen buyers principally wish to buy exactly on Bremen rules. They are hard to be had for any exceptions, nevertheless, I shall try and also *in* this point do my best for you. If, however, later on the resp. conditions shall prove to hinder business, I shall let you know.'

The statement which the plaintiff appears to acquiesce in and agree to be bound by is the statement contained in this letter that 'all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future.'

It is conceded in the argument in the case by the attorneys on both sides that subsequent to the writing of the letter of December 14, 1908, the arbitration- buyers did demand were based on those grade and staple differences in force on the date of the sale, and therefore whatever there was in the proposition contained in the letter of August 21, 1908, by the defendant company, and the reply in the letter of December 14, 1908, by the plaintiff has been carried out and complied with in the transactions which occurred between the parties subsequent to that date, and there is nothing in the finding of the Bremen Board of Arbitration of the Bremen Cotton Exchange which contravened that particular phase which the defendant company proposed and which the plaintiff accepted. They went along subsequent to that time and arbitrated the differences under the rules of the Bremen Cotton Exchange, simply asking that one modification as contained in the request of the defendant company of August 21, 1908, and answered in the letter of plaintiff of September
134 14, 1908, This being so, the court is of opinion that the plaintiff in this case is entitled to recover not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with

the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of $85,000.00 being the total amount of money which he paid and claims to be liable for, plus the seventeen hundred and some odd dollars which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money which he actually paid out on account of those contracts as such guarantor and surety.

The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the Board of Arbitration of the Bremen Cotton Exchange, and which has been in evidence to you, is $36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of $1730.16 for deficiencies in weight, etc., of the cotton, and the further sum of $36,610.96 being the amount of the award of the Board of Arbitrators, of the Bremen Cotton Exchange which the plaintiff has paid, and I have had prepared a verdict which I now read, and which some member of your body will sign as foreman.

'We, the jury, under the direction of the court, find for the plaintiff in the sum of $1730.16 for deficiencies in weight, etc., of
135 cotton, and the further sum of $36,610.96 being the amount paid by the plaintiff on the awards made by the Bremen Arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars.' "

Verdict of Jury in Cause No. 156.

Plaintiff introduced in evidence as bearing upon his plea of res adjudicata the verdict of the jury in said cause No. 156, of Carl R. Heye vs. Birge-Forbes Company, the same being dated May 23rd, 1913, and set out at length in the charge of the court hereinbefore copied.

Charge of Court in Cause No. 156.

Plaintiff for the same purpose introduced in evidence the judgment of the court based upon the verdict of the jury in said cause No. 156, Carl R. Heye vs. Birge-Forbes Co., as follows:

"On this 19th day of May, 1913, this cause came on to be heard, and both parties appeared and announced ready for trial. Then came a jury of twelve lawful men, viz., H. H. Chesnutt, and eleven others, who were duly empaneled and sworn to try the cause. After hearing the evidence and the arguments of counsel as to the law of the case, the court on the 23rd day of May, 1913, directed a verdict

and thereupon the jury delivered in open court the following verdict, to-wit:

'We, the jury, under directions of the court, find for the plaintiff in the sum of seventeen hundred and thirty and 16/100
136 dollars for deficiencies in weight, etc., of cotton, and the further sum of thirty-six thousand, six hundred and ten and 96/100 dollars, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest per annum on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars. Sherman, Texas, May 23rd, 1913. H. H. Chesnutt, Foreman.'

It is therefore considered and adjudged by the court, in pursuance of said verdict, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, the Birge-Forbes Company, a private corporation, the sum of forty-three thousand eighty-two and 64/100 ($43,082.64) dollars with interest thereon from this date at the rate of six per cent per annum, said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid and as to which a cause of action in his favor against the defendant has already accrued. It is further considered and adjudged by the court that plaintiff recover of defendant all costs of this suit and that he have his execution for the enforcement of this judgment."

Objections to Deposition of Carl R. Heye.

Plaintiff introduced in evidence the deposition of Carl R. Heye, which is hereinbefore fully set out at length.

When this deposition was offered to be read the defendant objected to the same as a whole on the ground that it showed
137 that the witness is a party plaintiff and his deposition de bene esse would not be admissible in evidence; and, second, that it is shown that the deposition was taken in a foreign country and was not taken in compliance with the law which authorizes the taking of depositions in a foreign country; third, because it appears that the deposition was not returned in the manner required by the Act of 1892 under which it appears to have been attempted to be taken as shown by defendant's motion to quash. The court overruled the objections and in so doing stated that he based his action upon the reasons given in his opinion in ruling on the motion to quash. To this action of the court the defendant then and there in open court excepted, and still excepts, and in this behalf tenders its bill of exception.

The defendant objected to the answer of the witness to the second direct interrogatory because the same is a conclusion of the witness in that he does not specify what sums were paid nor how much was paid to each party. This objection was overruled by the court, to which action of the court, the defendant then and there duly excepted and still excepts, and in this behalf tenders its bill of exception.

Defendant objected to the answer to the third direct interrogatory on the ground that the notes would be the best evidence, and in connection with the objection called the attention of the court to the answer of the witness Polletin hereinabove set out, to the sixth direct interrogatory in which said witness stated that the notes referred to were in the possession of said witness. The court overruled the objection and in so doing made this statement: "My view is that the answer is admissible and that the objection you raise goes to
138 the value of the answer and the strength to be given to it by the jury. If it were an attempt on the part of the plaintiff Heye to prove the contents of the notes, I think the notes would be the better evidence, and that the objection should be sustained, unless the absence of the notes was accounted for in a satisfactory way." To this action of the court the defendant then and there excepted and still excepts, and in this behalf tenders its bill of exception.

The defendant objected to the answer to the fourth direct interrogatory for the same reasons as stated as grounds of objection to the answer to the third direct interrogatory, calling the attention of the court to the answer of the witness, Oscar Polletin, to the sixth direct interrogatory propounded to him. These objections were overruled by the court, to which action of the court the defendant excepted, and still excepts, and in this behalf tenders its bill of exception In this connection the defendant requested the court to also consider in connection with its objections to the answers of the witness Heye to the third and fourth direct interrogatories, the answer of the witness Oscar Polletin to the seventh direct interrogatory propounded to him, which the court did, but still adhered to the rulings made on said objections.

Objections to Deposition of Oscar Polletin.

Plaintiff introduced in evidence the deposition of the witness, Oscar Polletin, hereinbefore set out at length.

Defendant objected to the answer to the fourth direct interrogatory because, first, it calls for the conclusion of the witness on a mixed question of fact and law; secondly, because the answer of the witness to the seventh cross interrogatory shows that the opinion upon
139 which he bases his answer is hearsay. These objections were sustained by the court, to which action of the court the plaintiff then and there excepted, and still excepts, and in this behalf tenders his bill of exception.

Defendant objected to the answer to the fifth direct interrogatory because the answer to the seventh cross interrogatory shows that the information of the witness is derived from hearsay sources and the interrogatory which the witness answers calls for a conclusion of German Law, and it is not shown that the witness is competent to testify to it, and it invades the province of the court. This objection was sustained by the court, to which action of the court the plaintiff then and there excepted, and still excepts, and in this behalf tenders his bill of exception.

Defendant objected to the answer to the sixth direct interrogatory

because the witness does not attach the originals, which he requested to attach, but simply refers to some previous deposition to which he says are attached copies. The court overruled the objection, at the time stating: "The translated copies are not offered yet and I am not called upon to rule on them. The answer simply explains why the witness does not attach the originals." To this action of the court, the defendant then and there excepted, and still excepts, and in this behalf tenders its bill of exception.

Defendant objected to the answer to the seventh direct interrogatory because the same is immaterial and there is no proof that any notes were given or for what purpose they were given and the opinion of the witness as to the purpose of giving the notes is
140 clearly hearsay. No connection is shown between the notes to which he refers and the notes involved in this case. The court sustained the objection as to this portion of said answer: "To confirm this fact too I induced Mr. Dr. Vogt, to whom the handwriting of said Heye is quite familiar too, to make a solemn statement to this effect, and attach his declaration to this answer as exhibit BB." As to the remainder of the answer to said interrogatory the court overruled the objections. To the action of the court in failing to sustain the objections to the entire answer, the defendant then and there in open court excepted, and still excepts, and in this behalf tenders its bill of exception. In excluding the last sentence of the answer the court stated that he did so because it was merely an ex parte statement of the witness.

The defendant objected to the answer to the eighth direct interrogatory for the reason that the answer to the ninth cross interrogatory by the same witness shows that the information upon which he bases his answer to direct interrogatory eighth is hearsay. The court sustained the objection and in doing so stated that in his opinion the witness derives his knowledge from a process of reasoning and that the jury is as competent to draw the conclusion as the witness. To this action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exception.

Defendant objected to this portion of the answer of the witness to the ninth direct interrogatory: "And then ordered Mr. Matussek to deliver the notes to the payees," because it was a conversation between the plaintiff, Carl R. Heye, and his clerk, the defendant not being present, and therefore hearsay. This objection was
141 overruled by the court, to which action of the court the defendant then and there excepted and still excepts and in this behalf tenders its bill of exception.

The defendant objected to the answer to the tenth direct interrogatory because the answers of the witness to cross interrogatories twenty-one and twenty-two show that the information about which the witness attempts to testify in his answer to the tenth direct interrogatory was derived from hearsay, and to this language contained in the answer of the witness to said tenth direct interrogatory: "In my inquiry when surrendering the notes to Mr. Heye's office Mr. Matussek informed me that in the different offices of the creditors he paid the respective sums to a clerk who brought the cash to the

private offices of the principals and after a while surrendered him the note with the receipt signed on the back by the respective firm," the defendant objected as hearsay and self-serving. The court overruled these objections because the testimony showed that Mr. Matussek was and is dead. To this action of the court the defendant then and there excepted and still excepts, and in this behalf tenders its bill of exception.

Defendant objected to this language contained in the answer of said witness to the twelfth direct interrogatory: "Moreover, to prove these facts, I offered a sworn statement of each person who signed the receipts for the respective firms attached to my deposition of November, 1914, as Exhibits A-O, which are in the possession of the court and which were taken by a German Notary Public," for the reason that this portion of the answer refers to another deposition taken in another case. The court sustained this objection. To this action of the court the plaintiff then and there excepted, and still excepts, and in this behalf tenders his bill of exception.

142 At this time the plaintiff offered from exhibits referred to in the answer of the witness to the fourteenth direct interrogatory only those entries dated April 22nd, 1914, and May 6th, 1914. The plaintiff in view of what appears from subsequent answers to direct and cross interrogatories at this time re-offered the answer to the fourth direct interrogatory heretofore excluded by the court. The defendant renewed its objections heretofore urged to said answers and the court again sustained such objections. To this action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exception.

The plaintiff again offered the answer to the fifth direct interrogatory heretofore excluded by the court. The defendant renewed its objection to the answer of said witness to said fifth direct interrogatory for the same reasons as heretofore urged. The court overruled the objections except as to this language of said answer: "To prove this I induced Mr. Dr. Voigt, a Notary Public at the Free and Hanseatic City of Bremen, to give a written declaration in this behalf and add it as exhibit AA," the objection to which was sustained by the court. To which action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exceptions. Plaintiff re-offered the answer to the eighth direct interrogatory heretofore excluded by the court. The defendant urged the objections heretofore stated to said answer which objections were again sustained by the court. To this action of the court the plaintiff then and there excepted and in this behalf tenders his bill of exception.

Plaintiff's counsel stated that he did not offer exhibits AA and BB which appear to be certificates of Dr. Voigt.

143 Plaintiff offered in evidence as part of the deposition of the witness, Oscar Polletin, exhibits A to O attached to the former deposition of said Oscar Polletin taken in November, 1915, and referred to and made a part of his deposition herein set out. Said exhibits being copies of the notes given to the various reclamation claim holders. To the admission of these exhibits as testimony in this case the defendant objected because the same are not properly

identified as exhibits to the deposition being read at this trial; that it is not permissible to refer to some instrument at a distance and testify with reference to it, but it is necessary to attach it to the particular deposition that is being offered and identify it as an exhibit to that deposition. Further, that the testimony offered is not the best evidence, it appearing that the originals of said notes are in the possession and control of the plaintiff. Defendant further objected to the endorsements on said exhibits as hearsay if they are offered for the purpose of proving payment. These objections were sustained by the court, to which action of the court the plaintiff then and there excepted, and still excepts, and in this behalf tenders his bill of exception.

Agreement as to Value of German Mark.

By agreement of counsel for defendant, plaintiff's counsel was permitted to state as evidence that Webster's New International Dictionary states the value of a German mark in American money to be 23 8/10c.; that is, 23 8/10c. is the standard value of a German mark.

Plaintiff rests.

144 *Testimony of Geo. C. Butte.*

GEORGE C. BUTTE, a witness for defendant, testified:

I am a Professor of Law in the University of Texas. I practiced law for seven years. First began the practice of law in 1904, and at that time I had studied law two years in the University of Texas, was admitted to the Bar in Texas in 1904, and in the same year moved to Oklahoma, was admitted to the Bar there and practiced in Oklahoma from 1904 to 1911. I went from Oklahoma to Germany and in 1911 I studied law in the University of Berlin, and in 1912 in the University of Heidelberg. In 1913 I received the degree of Doctor of Laws from the University of Heidelberg. I remained in Germany three and a half years and then went to Austin and accepted the position in the University of Texas as Professor of Law. My position is Associate Professor of Law in the University. I teach Conflict of Laws, International Law, Admiralty Law, and Equity. I have made investigation of the German Law and have contributed to German periodicals on the subject of the German Law. I have written one book in German on a law question.

Q. Now we have a suit which involves a shipment of cotton from Texas to Bremen, Germany, by the defendant in this case. In Germany complaint was made as to the cotton being inferior in quality to the cotton called for in the contract. Now what would be the remedy of the buyer in Germany under the German law?

When this question was propounded to the witness the plaintiff objected to the question and the testimony sought to be elicited thereby as irrelevant and immaterial, and because the hypothetical
145 question put to the witness does not sufficiently inform the wit-

ness of the facts appearing from the evidence in this case to enable the witness to give an intelligent answer to the question. The question does not state anything about the arbitration and the results thereof and elements necessary to be put to the witness before he can answer the question properly.

In answer to a question propounded to the witness by plaintiff's counsel he stated that the subject about which he had been asked was controlled by statutes in Germany.

The witness further testified: I hold in my hand a copy of the German Civil Code and it is the self same book I used as a law student in the Universities of Berlin and Heidelberg, and it is the book in common use in the German Empire. This book is in the German language. The common law in Germany is the Roman and Civil law. In Germany they have a body of laws not statute laws, but since 1901 the common law has fallen into secondary position. Prior to 1900 and the codification of the German Law the common law cut a more important figure than to-day. All the German laws of limitation are based on statute law. This book was published some time after October, 1899, but the date of its publication does not appear. In response to the question as to what limitation period existed in Germany I now refer you to section 477 which is the German Civil Code. I can state this of my own personal knowledge or can state it as a translation of this paragraph. In English, paragraph 477 reads as follows: "The claim of the buyer for rescission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is outlawed in so
146 far as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from the delivery of the goods; in the case of real estate in one year from the transfer of possession. This limitation period can be extended by agreement." Now I think that is all that is material in that paragraph. There are some other things in the paragraph that do not have a bearing on the question.

Q. Now in your opinion what would be the limitation by the statute in the case I have put to you in Germany?

When this question was propounded plaintiff's counsel objected to the question and the evidence sought to be elicited thereby because the same would be irrelevant and immaterial, not the best evidence and not the proper way to prove the statutes, the witness having stated that the matter is controlled by statutory law, and because the proper method is not by the opinion of the witness, but by the translation of all the statutes that bear on the subject and because the witness is asked for his construction of the statute. The court overruled the objection and stated that the witness had shown himself to be an expert, that he had stated the number of years he studied law in Germany and his familiarity with the German statutory law. To this action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exception.

Q. Answer the question.

A. In my opinion the transaction about which you have asked falls within this provision of the law and the claims of the buyers of this cotton are outlawed within six months from the time of the delivery of the cotton, or, I should say, after six months from
147 the delivery of the cotton. The statute to which I refer was in force in 1910 and has been in force since that date.

Cross-examination:

I have never practiced law in Germany. I have been a practitioner in the State of Oklahoma. My knowledge of German law is what I learned as a student in German Universities and my studies since then. I am now working on a translation of the German Code of Civil Procedure. I have already translated the German Acts described in the German Judicial system. I left the German Universities in 1913 and have not been to Germany since. I left Germany in August, 1914, shortly after the outbreak of the war, and I can not answer as to what, if any, laws have been enacted in Germany since that time. I only know that the German Civil Code I have was the accepted law of Germany when I left there in August, 1914. The German limitation law with respect to a party against whom a cause of action existed and who was not within the German Empire at the time it occurred is no different from the time I have given. I mean to testify that limitation runs in favor of a non-resident who is not in Germany to be served with process and does not come within the Empire to be served with process. The code of Civil Procedure of Germany provides a method for getting service on a non-resident. There is no provision in the German code in regard to the period of limitation in case claims have been adjudicated by arbitration by a Board such as the Bremen Cotton Exchange. There is a provision with relation to claims settled by statutory arbitration, a court appointed in conformity with the statute and the judgment of a court of arbitration constituted in conformity with the statute provided in the code of Civil Procedure has
148 the effect of a judgment of a regular court and expires in thirty years. I have looked into the question as to whether or not it is the practice and holdings of the German courts that where arbitrations on cotton have been had according to the rules of the Cotton Exchange the limitation of thirty years would apply to such arbitration. I looked into that question in order to be fully informed as to this case. I read carefully the record in the previous case between the same parties which was number 156 I believe. I am familiar with the general facts of this case and assume they are the same except as to the time of payment. Now the proceeding which constitutes the basis of the claims was not a statutory arbitration at all, and therefore was not an arbitral award in any sense, not an award deemed equivalent to a judgment of the court except as to the facts which were found. It is conclusive upon the parties as to the fact of the uniformity of the goods but not an arbitral judgment in the sense of a statutory arbitration proceeding, therefore the thirty year statutory period does not apply to the awards in question in this case being merely the evidence of experts on questions

of fact and not equivalent to a judicial judgment. There is no length of time prescribed in which arbitration, such as the one had in this case, would hold good because they are not looked upon as judgments. They are simply findings of the specific fact that this cotton was of such and such a grade. As before stated they are not statutory arbitration proceedings at all. The findings of a statutory arbitration has the same effect as a judgment of the court and upon the filing of the findings in the office of the clerk execution can be issued thereon. No such thing as that can be done on these
149 awards. They are merely findings of experts on questions of fact. The statute says that the limitation period is six months from the delivery of the goods and that has been construed to mean from the 1st of January next following. That is a matter of construction. In a case where there are sales of cotton or any other articles of produce by one merchant or dealer to another merchant or dealer I undertake to say that the limitation of thirty years does not apply in that case. In the case where a merchant sues for the delivery of goods in such a case as that, recovery can be had only within a period of two years, and that two years dates from the 1st of January next after delivery. And the third party, the party to whom they are delivered, if he desires to bring suit on account of the articles sold and delivered to him not being up to the contract, that would come within Section 477 that I read and he must sue within six months after the date of the delivery of the goods for defects in the quality of the goods. If both of the parties are merchants and traders any suit brought for defective quality must be brought within six months. Under the German statute there are a number of things that will prevent or arrest the running of the statute of limitation. Payment or acknowledgment of the debt suspends the running of the statute, the act of God suspends the running of the statute, and by the act of God, or Hoehrere Gewalt, is meant the Higher Power. If war breaks out and the court houses are closed that is specifically mentioned as suspending the statute of limitation. A written acknowledgment of a debt, if the contract is such as must be in writing, or oral, if the contract is such as may be made in parole, would suspend the running of the statute. Where the contract is in writing or where the contract is required to be in
150 writing the acknowledgment of the debt must be in writing. Whether the contract is in writing or oral, if it is one that might be made orally and still be valid under the law, then an oral acknowledgment is good to control the statute of limitation. Part payment of any debt stops limitation and so does the bringing of a suit of course. After part payment of the debt, limitation would have to begin to run anew. A contract for the sale of cotton or any other personal property may, under the laws of Germany, be either in writing or oral.

Question by the Court: Now if one party sells to another party personal property and guarantees or represents it to be of certain quality, and under certain conditions, and the buyer on receipt of the property from the seller discovers that it is inferior in grade and quality, that, under our system, would give to the buyer a cause of

action which we sometimes denominate as an action for unliquidated damages. Do they have any similar action of that kind in Germany?

To this question the witness answered: No, sir, the buyer has the remedies I have indicated. They do not in Germany have actions of that kind for unliquidated damages.

Question by the Court: Suppose the parties to the transaction for the purchase and sale of personal property, realizing that there may be differences of opinion between them as to whether the property sold by the seller to the buyer comes up to and fulfils the warranties given by the seller to the buyer, realizing that there may be differences upon that subject, they have agreed between themselves that they will constitute a certain number of men, I don't care what you call them, but a certain designated number of men they agree to constitute as the proper persons to be clothed with the authority as between the buyer and seller to estimate, determine and fix by their judgment—and I mean by judgment as distinguished from the judgment of a court, their opinion, the real amount of money which represents the difference between what the seller sold the buyer and what was delivered to the buyer under the contract and that body ascertains that amount, now then under those circumstances, when does limitation begin to run, from the time the goods were received by the buyer or from the time the duly constituted tribunal fixes the liability?

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To this the witness answered: It does not change the running of the statute. There is a special provision in the law that the buyer may accept the goods knowing of the defect and he has the same remedies as if he did not know of the defect at the time he accepted the goods, provided he makes a reservation that he accepts them subject to reclamation for the defect. I take the agreement as equivalent to a reservation between the parties at the time of the acceptance of the goods.

Question by the Court: The parties have agreed that certain individuals, three or more, shall hear the statements from both sides and determine how much money it takes to express the failure of the goods to reach the warranty under which the seller sold, when does the limitation begin to run, from the time when the goods were sold, or the time when the parties through their duly constituted authority received the information as to the amount of money which would represent the failure of the goods to come up to the representations and warranties?

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To this question the witness answered: It would run from the time of the delivery of the goods.

Question by the Court: Suppose these appraisers whom the parties have agreed upon to investigate the matter and determine how much damage was occasioned to the buyer by the failure of the seller to send goods corresponding to his warranties should be engaged in their deliberations longer than six months, would the claim be barred?

To this question the witness answered: Yes, sir, because their finding is merely a finding of fact. It creates no additional liability

between the parties beyond that which grows out of the contract of sale. These appraising commissions are very common in Germany. The appraisers are experts and their findings are not to be taken as arbitral awards but findings of fact binding on the parties. The party who feels himself aggrieved in a transaction of that kind must see to it that the finding of the appraisers is made within the period of six months, so that in the event the other party fails to pay what the appraisers find to be due, he must bring his suit within six months, and then the finding of fact of the appraisers can not be challenged.

Testimony of N. B. Birge.

N. B. Birge, a witness for the defendant, testified:

I am a stockholder in the defendant, Birge-Forbes Co., or was such stockholder and held the position of president of the corpora-
153 tion. I am in the cotton business. I know the value of German marks in American money today. We get the quotations every day and we are shipping cotton to different parts nearly all the time. We have not shipped any lately to Germany but we get the quotations regularly, as to what English money is worth, what French money is worth and what German money is worth. The last information I had on the subject was that four German marks were worth 72½c. in American money. That is the way they quote it and one mark would be worth 18⅛c. 159,715.97 marks figured at 18⅛c. for each mark would be worth in American money $28,948.51.

Cross-examination:

I arrive at the value of a German mark by my knowledge of what the buyers of foreign exchange in New York offer to sell it and buy it for. In this country they quote German Exchange at so many cents for four marks. I arrive at the value of 18⅛c. for a German mark by the quotations on the market for Exchange on Germany and the price they offer to buy or sell exchange at. I have not information on the subject from any other source. I do not know as a matter of fact that in October, 1916, the United States government quotations concerning German gold marks showed that a German gold mark was worth 23.80c. The only way I have of determining the value of German money is by the quotations I have stated. I think the war causes the depreciation of foreign money. I think it is caused to a great extent by the financial conditions of foreign countries. All of their money is discounted—even English. I don't think I ever saw any actual marks. I never knew personally of any one
154 actually buying marks unless you call it marks when you buy exchange from the New York bankers. I do not know of any transactions where the actual money and not exchange was bought.

Motion to Strike out Testimony of N. B. Birge.

Plaintiff moved the court to strike out the testimony of the witness, N. B. Birge, in regard to the value in American money in German marks, because it is irrelevant and immaterial and the cross-examination of the witness shows that his knowledge of the value of a German mark is based solely upon the exchange market, and the price of exchange is wholly immaterial to this inquiry, because if a tender should be made either in Germany or America by the defendant in this case of the money that we claim is due to Heye, we would not be required to take it in exchange. The tender would not be legal unless it was made in actual German coin, and the Exchange is an entirely different thing. The price of that may be higher or lower and is wholly immaterial in this case. The test is not what exchange sells for at the present time but the actual real value of the German coin. This motion was denied by the court and the testimony of the witness permitted to go before the jury for their consideration. To which action of the court the plaintiff in open court excepted and in this behalf tenders his bill of exception.

Testimony of Geo. C. Butte, Recalled.

GEORGE C. BUTTE being recalled by the defendant testified:

Under the German law where there is no provision made for any other rate of interest four per cent is the rate from the time the debt is due. Under the German law they do not distinguish be-
155 tween contracts in writing and contracts not in writing in the matter of the limitation period. The law specifies certain forms of accounts and names the limitation period after which those claims or the right of action on those claims will be barred, and also the claims themselves. There is of course an express provision as to limitation growing out of a contract of sale.

Motion of Plaintiff to Exclude Parts of Deposition of Oscar Polletin.

The plaintiff introduced in evidence, in view of the testimony introduced by the defendant on the question of limitation, those parts of the exhibits to the deposition of the witness, Oscar Polletin, which show the payments made by Heye to the Bremen creditors prior to the recovery of the judgment in the other case. Plaintiff's counsel stated that he offered them as showing part payment which would arrest and prevent limitation from running and barring the claims. When this testimony was offered to be introduced the defendant objected to the same on the grounds that it was irrelevant, immaterial and incompetent for the purpose for which it was offered in that any payment made by the plaintiff in this suit such as he is offering in evidence could not affect the rights of the defendant in this suit, and, furthermore, under the proof here this claim was barred when the alleged payments were made by Heye because the six months' period from

the delivery of the goods had long since expired. These objections were overruled by the court and the testimony admitted for consideration. To this action of the court the defendant then and there excepted and in this behalf tenders its bill of exception.

156 *Motion of Plaintiff to Exclude Certain Parts of Testimony of Geo. C. Butte.*

At this point plaintiff's counsel moved the court to exclude from the record the testimony of the witness, Geo. C. Butte, concerning Section 477 of the German Civil Code and his testimony as to the six months period of limitation because of the fatal variance between the allegations of the defendant in this case on the subject of limitation and the evidence of said witness on that subject. The defendant has plead only the two years statute of limitation according to the laws of Germany and has introduced no testimony whatever as to the two years' statute of limitation. The only testimony the defendant has introduced thus far on the subject of limitation is the six months' statute, and the plaintiff was not prepared for that and is surprised by it because it i sa different period of limitation and a different statute from the one alleged in the pleading. The court while he did not refuse to grant the motion of the plaintiff stated to counsel that he would take the matter under advisement. To this action of the court and the failure of the court to sustain the motion to exclude the testimony of said Geo. C. Butte, the plaintiff then and there in open court excepted and still excepts and in this behalf tenders his bill of exception.

Agreement as to Translation of German Civil Code.

Here counsel for plaintiff and counsel for defendant agreed that Geo. C. Butte and C. Von Carlowitz might translate from the German to the English all the sections of the German Civil Code relating to and bearing upon the limitation periods prevailing under the
157 laws of the German Empire. Subsequently said Geo. C. Butte and C. Von Carlowitz reported to the court that they had agreed on translation contained in Wang's English translation of the German Civil Code and filed in court the following agreement:

"We, Geo. C. Butte and C. Von Carlowitz, witnesses, in the above cause, have examined Wang's English translation of the German Civil Code, and we mutually find and agree that the following sections are correctly translated in said book: Chapter 5; Sections 194-225; 459-480; 765 to 778, except the word 'guaranty' instead of 'suretyship' would be the better translation.

GEO. C. BUTTE.
C. VON CARLOWITZ."

Portions of German Civil Code.

Whereupon plaintiff introduced in evidence the following sections of said German Civil Code:

"195. The regular period of prescription is 30 years."

"202. Prescription is suspended so long as the performance is stayed or the obligor is temporarily entitled on any other ground to refuse performance. This provision does not apply to the pleas of right of lien, of unperformed contract, of absence of security or of beneficium excussionis, nor to the pleas available to a surety as provided for by 770 and to an heir as provided for by 2014, 2015."

"208. Prescription is interrupted if the obligor acknowledges the claim toward the obligee by part payment, payment of interest, giving of security, or in any other manner."

"218. A claim established by a non appealable judgment is barred by prescription in 30 years even if it is itself subject to a
158 shorter period of prescription. The same rule applies to a claim arising from an executory compromise or an executory deed, and a claim becoming executory to settlement in bankruptcy proceedings. In so far as the settlement relates to periodical payments becoming due only in the future the shorter period of prescription is sufficient."

"220. If a claim is required to be enforced before a court of arbitration or a special tribunal, before an administrative court or an administrative authority the provisions of 209 to 213, 215, 216, 218, 219 apply mutadis mutandis. If the arbitrators are not nominated in the agreement as to arbitration, or if an arbitrator is necessary for any other reason, or if the court of arbitration can not be invoked until after the fulfillment of some other condition, the prescription is already interrupted by the obligee taking the steps necessary on his part for the settlement of the matter."

When the above sections of the German Civil Code were offered to be introduced in evidence, the defendant objected to same as wholly irrelevant and immaterial. These objections were overruled by the court, the court at the time stating that in his judgment the case had resolved itself into questions of law for the consideration of the court and the court would receive the said sections of the said German Civil Code and give them such weight as in his judgment they were entitled to receive. To which action of the court defendant then and there excepted, and still excepts, and in this behalf tenders its bill of exception.

Offer of Petition in Cause No. 156.

For the purpose of showing that there had been an acknowledgment of the debt the plaintiff offered in evidence the original
159 petition filed in cause No. 156 and which is hereinbefore set out at length. The defendant objected to the introduction of said pleading because the same was wholly irrelevant and immaterial. This objection was sustained by the court, to which action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exception.

Offer of Original Petition in this Cause.

Plaintiff offered in evidence for the same purpose the original petition filed in this cause No. 83. Defendant objected to the introduction of said petition for the purpose offered because the same would be wholly irrelevant and immaterial. These objections were sustained by the court, to which action of the court the plaintiff then and there excepted and still excepts, and in this behalf tenders his bill of exception.

Agreement of Birge-Forbes Co. and Carl R. Heye.

Plaintiff introduced in evidence the following agreement:

"This agreement made and entered into this the 27th day of January, A. D. 1911, at Sherman, Texas, by and between the Birge-Forbes Company, of Sherman, Texas, a corporation duly organized under the laws of the State of Texas, hereinafter called 'First Party,' and Carl R. Heye, a resident of Bremen, Germany, hereinafter styled 'Second party,'

Witnesseth:

That, whereas first party has shipped to second party at Bremen, Germany, about fifteen thousand five hundred (15,500) bales of cotton during the current season; and

160 Whereas, first party is dissatisfied with the allowances heretofore made by the Bremen Board of Arbitration on such of this cotton as has been arbitrated, to-wit: About Ten Thousand (10,000) bales; and

Whereas, both parties are willing that the balance of the cotton be arbitrated in a different manner

Now, therefore, it is mutually agreed, for a valuable consideration, that first party appoint a man in Liverpool, England, as its arbitrator, and second party appoint a man in Liverpool, England, as his arbitrator, these two arbitrators to attempt to arbitrate the balance of the cotton not yet arbitrated; if these two arbitrators can agree, their decision is to be final. If they cannot agree, they are to appoint a third arbitrator, to be agreed on by them, and his decision is to control and be final. Fresh samples of the cotton to be arbitrated, the said samples to be properly drawn in the presence of and under the supervision of a controller to be named by the first party, are to be forwarded direct to the Liverpool arbitrators.

It is understood and agreed that the average allowance reached by the Liverpool arbitrators is to be applied as the average allowance to be paid on the cotton previously arbitrated in Bremen, Germany; that is to say, that the average amount allowed per pound on the cotton arbitrated by the Liverpool arbitrators, is to be multiplied by the total number of net landing pounds shipped by first party to or through second party during the present cotton season, and the amount thus reached shall be the allowance to be paid by first party.

The allowances made by the Liverpool arbitrators are to be paid by first party immediately on receipt of each claim, as allowed by them.

161 The differences to govern in the arbitration of this cotton are to be one-sixteenth (1.16d) of a penny per pound between half grades, that is to say between fully good middling and good middling or between good middling and fully middling, and the actual differences between various staples that the Liverpool buyers were paying first party and other American shippers on dates of sales for C. I. F. and 6% cotton.

The Liverpool arbitrators are to determine what the actual differences were that *was* actually paid by Liverpool buyers to first party and other American shippers for C. I. F. and 6% cotton on date of sale.

The cotton is to be arbitrated on the same grade and staple descriptions as sold by first party.

Witness our signatures the day and year first above written."

When the above agreement was offered to be introduced the defendant objected to its reception and consideration by the court because it would be irrelevant and immaterial to any issue in this case. These objections were overruled by the court, to which action of the court the defendant then and there excepted and still excepts, and in this behalf tenders its bill of exception.

Letter from Lassiter, Harrison & Rowland to Head, Smith, Hare & Head.

Plaintiff offered in evidence the following letter dated July 11th, 1911, from Lassiter, Harrison & Rowland to Head, Smith, Hare & Head:

"Replying to your favor of the 7th, I beg to say that Mr. Heye's representative here, Mr. Frerichs, advises that Mr. Crusemann

162 of his firm is now en route to the United States and is expected to arrive here within about a week. Mr. Crusemann has lately been to Liverpool and will throw further light on the question whether there was any cotton of the length of 30 millimeters traded in in Liverpool on the dates covered by the arbitration contract. After talking to Mr. Crusemann, I will advise you whether or not I think there is any reasonable chance that progress can be made by the appointment of different arbitrators.

In the mean time, let me understand exactly what your suggestion contemplates as to a conference between representatives of the Birge-Forbes Company and Mr. Heye to determine the differences which should be made between 30 millimeter cotton and the various staples that were sold at Liverpool during the dates in question. Your former letter suggested that these representatives endeavor to agree upon the certain differences in inches between the different lengths of staple to be applied as the basis of settlement for differences between 30 millimeters cotton and shorter staples in millimeter lengths.

Does this agreement contemplate that these representatives should agree on a difference in value of the different lengths of cotton sold,

or that they shall merely agree what certain lengths expressed in millimeters is when expressed in inches?

Mr. Frerichs calls my attention to the fact that according to his understanding there has been no dispute by the Birge-Forbes Company as to the weight claims, and tells me that Mr. Heye has made
163 two drafts in favor of Hannay, Frerichs & Company against the Birge-Forbes Co., of date June 6th, one for $709.48 and the other for $10,206.00 on weight claims. Will you kindly ascertain and advise whether there is any reason why these drafts should not be paid?"

When this letter was offered to be introduced in evidence by the plaintiff the defendant objected to the same because it was irrelevant and immaterial to any issue involved in this case. This objection was sustained by the court and said letter excluded, to which action of the court the plaintiff then and there excepted and still excepts, and in this behalf tenders his bill of exception.

Plaintiff offered in evidence a letter from Birge-Forbes Company to Robt. W. Harrison, dated August 5th, 1911, as follows:

"In regard to changing agreement of January 27th, we desire to say that we are unwilling to change that agreement in any respect."

When this letter was offered to be introduced by the plaintiff the defendant objected to the reception of the same as evidence in this case because it was and is irrelevant and immaterial to any issue involved. The court sustained the objections of the defendant and refused to receive and consider said letter, to which action of the court the plaintiff then and there excepted and still excepts and in this behalf tenders his bill of exception.

Defendant's Request for Special Instructions.

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

164 "1. The evidence in this case is not sufficient to authorize you to find in favor of the plaintiff for any sum whatever and you will therefore return a verdict in favor of the defendant."

The court refused to give the jury this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception.

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

"2. The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of any of the buyers of the cotton sold by plaintiff as the agent of defendant, as alleged in plaintiff's petition, and you will therefore find in favor of the defendant."

The court refused to give this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception.

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

"3. The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of the buyers of cotton sold by plaintiff as the agents of defendant, beyond the sum of $36,610.96 for which plaintiff recovered judgment on the 23rd day of May, 1913, and which judgment is admitted in his pleading to have been paid by the defendant, and you will therefore return your verdict in favor of the defendant."

165 The court refused to give the jury this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception.

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

"4. The undisputed evidence in this case shows that whatever cause of action the buyers of the cotton may have had against plaintiff under the allegations contained in his petition became and was barred by limitation under the laws of Germany before the dates he alleges he made the payments for which recovery is sought, and you will therefore find in favor of the defendant."

The court refused to give the jury this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception.

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

"5. The undisputed evidence in this case shows that the value of a German mark, insofar as is involved in this suit, is 18 1/8c."

The court refused to give the jury this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception."

At the conclusion of the evidence, and before the argument began, the defendant requested the court to give to the jury the following special instruction:

166 "6. The judgment of May 23rd, 1913, in evidence before you was and is an adjudication that defendant was only liable to plaintiff upon the claims or awards set forth in the petition in that case in the amount for which judgment was rendered, and you will therefore find in favor of the defendant."

The court refused to give the jury this instruction, to which action of the court defendant then and there excepted and in this behalf tenders its bill of exception.

Whereupon the court instructed the jury as follows:

Charge of the Court.

In the District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83.

CARL R. HEYE

vs.

THE BIRGE-FORBES CO.

Charge of the Court (Verbal).

GENTLEMEN OF THE JURY: At the conclusion of the evidence in this case, both the plaintiff and the defendant submitted motions asking for an instructed verdict; that is to say, the plaintiff submitted a motion asking me to instruct the jury to return a verdict in his favor for the amount of money claimed by him to be due him by the defendant, and the defendant company also submitted a motion asking me to instruct the jury to return a verdict in favor of it and against the plaintiff as to the entire amount sued for by the plaintiff. These motions were made orally, and after having submitted these
167 motions, both sides have presented to me, as liberally and as fully as they wished to do, their arguments and reasons for making these two requests for an instructed verdict.

It is the contention of the plaintiff that every issue in this case which goes to establish the liability of the defendant company to the plaintiff was adjudicated in a former trial between these parties which happened in the spring of 1913 in this court. The defendant company, in reply to that position, contends that none of the issues which go to the liability of the defendant company on the claims here sued for were adjudicated by that former judgment rendered in this court. It is the further contention of the defendant company that if they are wrong with reference to whether the liability of the defendant company to the plaintiff has been determined by the former adjudication of May, 1913, that under the laws which prevailed in the German Empire, the claim of the plaintiff against the defendant is barred by the Statute of Limitation, because, at the time he claims to have made the payment of the sums of money represented by German marks on the 6th day of May, 1914, and at the time that he gave the notes which express this sum previous to the date of payment, that the claims of those who had reclamations for cotton against the plaintiff, Heye, were barred under the statutes of the German Empire, and that therefore, when he paid the claims, it was a voluntary payment on his part, which was not binding on the defendant company.

There is also, in the event I should determine the case in favor of the plaintiff, another contention as to what value should be given to

a German mark in the ascertainment of the amount of the
168 judgment to be rendered in dollars and cents, the plaintiff contending that the court has judicial knowledge of the fact that the German mark is worth 23 8/10c. and the defendant company contending that at the date when this trial is occurring the value of the German mark has depreciated and is now worth only 18 1/8c.

Of course, if the court should decide that the claims now presented for adjudication to the court, were not adjudicated insofar as the liability from the defendant company to the plaintiff is concerned, then under the state of facts existing here, I would be compelled to render a judgment for the defendant, and there would be no occasion for me to determine the proposition as to whether the value of a German mark is 23 8/10c. or 18⅛c. Furthermore, if the court should become convinced under the statutes which have been offered in evidence as to the periods of prescription and limitation which prevail in the German Empire, that the claims of the parties in Germany who asserted reclamations against the plaintiff, Carl R. Heye, were barred when he gave the notes and paid the debt, then in that event, the defendant here would not be liable and there would be no necessity for determining what is the value of the German mark in American coin, or ascertaining in any way what the equivalent of a German mark would be in dollars and cents.

So, you will observe from the statements made that these motions for instructed verdicts raise two vital issues. The first is as to whether the former judgment rendered in May, 1913, adjudicated the question of liability so far as the claims here sued on are concerned.

The plaintiff has offered in evidence the pleadings, the charge of the court, the verdict of the jury, and the judgment that
169 was rendered upon that verdict in this court on the 23rd day of May, 1913. These pleadings have been read, and it could serve no useful purpose to make a second incorporation of them in the record by reading them again, and I will therefore content myself with only alluding to them in a general way.

These pleadings exhibit the fact that there was a former suit between these same parties growing out of the transactions that occurred between them beginning early in 1901 and running into 1911, and that that portion of the transactions which occurred between them with which this former suit concerned itself were those transactions between the parties occurring between Oct., 1910, and the 1st of May, 1911. It was alleged in the petition of the plaintiff in the suit which culminated in the judgment of the 23rd of May, 1913, that the defendant company had by a contract and agreement between itself and the plaintiff constituted the plaintiff its selling agent in Bremen, Germany, to sell for it certain shipments of cotton. It was alleged that during the period in which the contract existed between the parties some 15,000 bales of cotton were shipped by the defendant company to the plaintiff, Carl R. Heye, at Bremen, Germany, to be sold by him as the agent of defendant. It was alleged that these sales were by the agreement of the parties to be made according to certain regulations existing on the Cotton Exchange in Bremen, and

that among other features of those regulations it was provided that if there should be reclamations made by the German buyers from Carl R. Heye as the selling agent of the defendant company which grew out of any differences in the quality, grade and staple of the cotton sold by Carl R. Heye for the defendant company,
170 that the ascertainment of the existence of such differences, as well as the ascertainment of the amount of money which such differences represented, was to be submitted to the Board of Arbitration of the Bremen Cotton Exchange. It was also alleged that growing out of these transactions from some time in Oct., 1910, to the 1st of May, 1911, the German buyers of the cotton shipped by the defendant company to the plaintiff Heye for sale by him as their agent, did make reclamations which amounted to $74,334.33, or 312,749.31 German marks, the latter amount being equivalent in German money to the former amount of American money. It was alleged that under the contract between these parties if either side should become dissatisfied with the finding of the Bremen Board of Arbitration of the Cotton Exchange at that place, that such party so dissatisfied should have the right of appeal to what is denominated as the Appeal Board, which Appeal Board has the power to pass upon the fairness and regularity of the arbitration made by the first Board which I have mentioned as the Arbitration Board of the Bremen Cotton Exchange. It is alleged in the original suit in 1913 that an appeal was taken from the Arbitration Board which found that the buyers of the cotton in Germany which the defendant had shipped and sold through the plaintiff, Carl R. Heye, should be awarded 312,749.31 German marks as the amount to which they are entitled upon the failure of the cotton shipped by the defendant to reach the classifications, grade and staple which the contract provided should characterize it. It is alleged that the finding of that Board of Arbitration was appealed from and the Appeal Board affirmed the fairness and justice of the award of the Board of Arbitration. And
171 the plaintiff thereupon alleges that under the contract and the sales made according to the regulations prevailing upon the Cotton Exchange in Bremen, he was entitled to recover back from the defendant the value of the money that he had paid to the buyers of the cotton in Germany who had made the reclamations.

Now the defendant resisted that contention of the plaintiff in the suit of May, 1913. The defendant denied that the cotton was to be sold according to the circumstances which I have just detailed, and the defendant further asserted that the arbitrations were unfair and unjust and that the awards were excessive and exorbitant and not expressive of the true condition of the contract as made; that the cotton was what it was represented to be and that therefore they were not liable to the plaintiff. They further alleged that there were certain circumstances which were to be understood and certain things which were to be performed by the plaintiff as their agent in order to fairly present their side of the issue to the Board of Arbitration of the Bremen Cotton Exchange and the Board of Appeal, and that plaintiff failed to perform those things which the contract required of him, and which, if he had performed, would have shown in the

particulars provided for in the rules of the Bremen Cotton Exchange that the cotton shipped by the defendant did come up to the contract under which it was shipped with regard to staple and character of fineness in every way, and, that plaintiff having failed to do his duty as the contract provided, and therefore having caused loss to the defendant, he ought not to be permitted to recover.

It was further contended if there was an agreement that the cotton should be sold according to the rules prevailing on the Bre-
172 men Cotton Exchange, and even if the arbitrations were as provided for in the rules, that subsequent to the finding of the Bremen Board, and the affirmance of it by the Appeal Board, the plaintiff, Carl R. Heye, and the defendant company entered into a new agreement to arbitrate by which under certain provisions in that agreement the arbitration was to occur in Liverpool, England, and that therefore the plaintiff was not entitled to recover in the suit of May, 1913, for the reason that this arbitration was the one on which he must base his claim rather than the arbitration made by the Bremen Board according to the rules of the Bremen Cotton Exchange. That suit went to trial with those issues involved. It appeared at the trial according to the allegations in the pleadings in that suit, as well as in the allegations in the pleadings here and the proof introduced on that trial, that the amount of $74,334.33 claimed by the plaintiff had not been paid. That he had only paid a portion of the amount and that he brought his suit upon the idea that he was obligated to pay the balance of the $74,334.33, and when that fact appeared in the trial the court directed the jury to find for the plaintiff in that first suit only the amount he had actually paid, and thereby in effect determined that in that suit, not having paid the balance of the amount, he would be entitled to recover only the amount he had paid. In other words, under the view of the case as taken by the court there, the plaintiff's right to recover the balance for which he sues at this time was practically an inchoate right and that the amount was not due according to the terms of the contract, and therefore plaintiff was not in a condition then, although he might have subsequently acquired the right to recover by
173 having paid the balance of the money, to have his claim matured into a judgment. The court thereupon directed a verdict for the amount that judgment showed, which was the whole amount claimed by the plaintiff in that suit, less what the evidence and pleadings showed the plaintiff Heye at that time had not paid to the holders of the reclamation claims.

Now the plaintiff Heye has brought this second suit which the pleadings show is to recover the amount found by the Board of Arbitration of the Bremen Cotton Exchange in his favor, less what is recovered by him against the defendant company in the suit of May 23rd, 1913. So that, the proposition to be decided here is whether the effect of the former judgment is conclusive against the defendant company as to the legality of the claims now sued on and the liability of the defendant company to pay them to the plaintiff. Upon the showing in this suit by the plaintiff that subsequent to the rendition of that judgment he had paid in money to the reclamation

holders the entire amount of the reclamation claims not paid at the time the former suit went to judgment, the question now is whether or not as before stated the former judgment is conclusive as to the right of the plaintiff to recover in this suit. Both parties have presented to me decisions of the highest court in the land upholding the contentions they have made, and my investigation of the authorities, has convinced me that there is no difference between these gentlemen as far as the law is concerned. This case is like many cases that are presented in the court room where the lawyers do not differ as to the law, but the differences become as wide as the two poles as to the application of the law. That seems to be the
174 situation here. Neither side disputes the fact that the law produced by their respective adversaries is the law if it can apply to the facts of this case. I have examined the two decisions in the 94th volume of the U. S. Supreme Court Reports to which my attention was called in the argument, and I find that in Cyc. the same propositions covered by those two decisions are stated very succinctly and clearly and I believe by referring to them I can make my view of the law more understandable than by reading excerpts from the two cases in 94 U. S. I have on my desk the 23rd volume of Cyc. which contains a very exhaustive article on the subject of judgments with a citation of authorities sustaining the text supplied by the writer of the article. At page 1215 I find this language:

"A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and can not be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action."

The next subdivision draws the distinction between the conclusiveness of a judgment and a bar created by the former recovery and uses this language:

"A former judgment between the same parties is a bar to the maintenance of the second action only when the causes of action in the two suits are identical. But it will be conclusive and final as to any issue litigated and determined in the former suit, and
175 coming in question in the second suit, although the latter is brought upon an entirely different cause of action."

Now I do not want to let pass out of my mind a proposition I think I am confronted with and that is to decide whether the liability of the defendant company to the plaintiff was adjudicated by the judgment of May 23rd, 1913, insofar as the finding of the Board of Arbitration of the Bremen Cotton Exchange is concerned. That is, whether that judgment, which was duly appealed from and affirmed by the Circuit Court of Appeals, determined the question as between these parties of the liability of the defendant company to the plaintiff for the amounts for which reclamation claims were made by the German buyers; in other words, whether the liability of the defendant company to the plaintiff was ascertained and decided by

the finding of the Bremen Board with respect to the cotton shipped during the season of 1910-1911 beginning some time in Oct., 1910, and ending May 1st, 1911, and whether the former judgment found that to be conclusive. As stated, the former case involved clearly under the pleadings whether the finding of the Bremen Board of Arbitration of the Cotton Exchange was a binding finding as between the reclamation holders of claims and Carl R. Heye for which under the terms of the contract the defendant company was liable to the plaintiff. That issue was litigated the plaintiff asserting in that case which matured into the judgment of May 23rd, 1913, that the finding of the Bremen Board was an arbitration by agreement which established the fact that the claims were valid and the amount which should be paid, the defendant company contending that
176 the finding was invalid because unfairly made, and because the findings were excessive and exorbitant and because the plaintiff in those litigations before that Board had not fairly represented the defendant company, and because subsequent to the finding of the Board they had agreed upon a new arbitration. All these issues were presented in the original suit and determined adversely to the defendant company here.

I call attention to one other passage on the subject which I have been discussing which appears on page 1298 of Cyc. I find this language:

"Identity of the subject matter is not the true test to determine whether a judgment in one action is conclusive in another, although some of the cases have stated this as a general rule. It is undoubtedly true that a judgment is evidence in a second action between the same parties or their privies concerning the same subject matter as to all questions litigated and decided; that a former judgment can not operate as a bar to a second suit unless it concerns the same subject matter and is upon the same cause of action, and that the estoppel of a judgment, whatever may be its extent as between the parties, is confined, as to their privies, to the particular subject of the litigation. But still it is a well settled rule that the judgment of a court of competent jurisdiction on a question directly involved in the suit is conclusive in a second suit between the same parties, where the same question comes again in issue, although the second action relates to a different subject matter. Thus the former judgment will be an estoppel where the same question or issue, depending on the same transaction or state of facts, arises also in the second suit, although in relation to different rights or different prop-
177 erty, but not where the question in the second suit, although similar to that in the first, grows out of a different transaction or state of facts, nor where the second action, although relating to the same subject matter, is between different parties, or grows out of the same subject matter, but involves a different question or claim in regard to it."

Furthermore:

"The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties

will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not. Or as the rule is otherwise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first."

Then skipping a paragraph, I find this rule given:

"The general rule is that a judgment is conclusive for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action."

Now I think the distinction made by the text there is clear and can be easily ascertained as to how it should be applied to this
178 case. There is no doubt but that in the first case which went to judgment on the 23rd of May, 1913, the plaintiff here, who was the plaintiff there, sought to recover from the defendant for the very claims which he seeks to recover now and that the result of the trial which failed to give him the recovery he seeks in this suit was occasioned because of the fact that he had not paid at that time the claims now sued on and which were presented in that trial, and which have subsequent to that judgment been paid. So that the vital issue was decided in the first trial—that is that the defendant was liable to the plaintiff under the contract between them for all reclamation claims found by the Board of Arbitration of the Bremen Cotton Exchange for cotton sold by plaintiff as agent of defendant, that is, the finding of the Bremen Board established the validity of the claims. But I held in the former trial that Heye could not recover from the defendant company then simply because he was liable to pay the reclamation claim holders; that his right to recover must be limited to the amount he had actually paid to the claim holders, and that was why the judgment was rendered for the sum it was and not for the full amount sued for.

Now in this case I think the pleadings and evidence establish the fact that this is a suit to recover on the part of the same plaintiff from the same defendant company the amount of reclamation claims Heye had not paid when the first suit went to judgment and which he has since paid. That can be very plainly established in my mind from an inspection of the testimony in the record and that portion of it upon which there is no dispute. Certain interrogatories were propounded to the plaintiff by his counsel and among them was interrogatory 2nd which reads as follows:

179 "Referring to the arbitration allowance made against the Birge-Forbes Company in favor of certain European buyers on account of cotton sold them at Bremen through you as selling agent during the cotton season of 1910-1911, and referring to the first suit brought by you against the Birge-Forbes Company based

upon said claims, which suit went to judgment in this court on May 23rd, 1913, please state whether or not you ever paid to the European purchasers the remaining sums due them that you had not actually paid at the time of the trial of said first suit?"

This interrogatory very plainly asked him whether since the judgment of May 23rd, 1913, he had completed the payment of the claims held by the reclamation claim holders growing out of the failure of the cotton shipped to come up in quality, grade and staple to what it was represented to be. His answer is as follows:

"In answer to interrogatory II the witness says: I state that I paid to the European purchasers of the Birge-Forbes Company's shipments during the cotton season of 1910-1911, all remaining sums still due them when judgment was given in my favor for the first part of this suit on May 23rd, 1913."

The answer to the next interrogatory sets out the parties to whom payments were made.

The deposition of the witness, Oscar Polletin, discloses the fact that he held what was called a power of attorney from the plaintiff, Carl R. Heye. The scope of his power does not appear in the evidence. I think it must have been something like General Manager of the business of Heye. He sets out exhibits from the books of the plaintiff, Carl R. Heye, which show that those payments were made and that they were made first by giving Heye's notes to the holders of the claims and afterwards the notes were taken up by the payment of cash by Carl R. Heye to those holders, and that this was done on the 6th of May, 1914. So that I feel like under the state of the law as the court conceives it to be applied to the evidence in this case that the liability of the defendant company on the claims sued for here was adjudicated in the former judgment between these same parties in this court which judgment was rendered on the 23rd of May, 1913.

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That leaves another question in the case which is the question of limitation. That is as to whether under the laws that prevailed in the German Empire this claim of the plaintiff, Carl R. Heye, can be enforced against the defendant company here. Or, to state the matter a little more literally, the question is whether when Heye paid to the German buyers their reclamation claims those claims as to Heye were barred, or as to the defendant company were barred by the statutes of limitation that prevailed in the German Empire. In other words, it is the contention of the defendant that when Heye made the payments to the reclamation claim holders, he was under no legal obligation to do so however great his moral obligation may have been, and that the payments were made voluntarily and therefore created no obligation on the defendant company to reimburse him. My attention has been called on this proposition to some sections of a book, which has been admitted to be correct, translating certain parts of the prescription or limitation laws of Germany. In order that the book may be identified, I will state in this connection that it calls itself, "The German Civil Code" and purports to have been translated and annotated by a Mr. Wang. My attention has been called to

181 Section 477 of this German Civil Code which reads as follows:

"The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of movables in six months after delivery; in the case of land in one year after the transfer. The period of prescription may be extended by contract."

Now, in my opinion, if this suit had been brought without any of the circumstances which surrounded the transaction between the parties, Section 477 of the German Civil Code would have barred the holders of the reclamation claims from obtaining any thing on account of the failure of the cotton purchased by them to come up to the contract representations as to quality, grade and staple. I think it is manifest that the enactment of this statute was intended to permit a speedy adjustment of those claims where there was a failure of an article sold by one person to another in Germany to come up to the promised quality of the article so sold; that is, while the matter is fresh in their minds and while the controversy is new, if it is then decided, it will be more apt to be a proper and just ascertainment than if delayed. Therefore I am convinced under ordinary circumstances that if these reclamation claim holders had undertaken to establish their claims more than six months after the delivery of the cotton, section 477 would have defeated a recovery if applied. That is not the situation here. These people had in advance some idea that there would be differences in judgment as to whether the

182 cotton sold would come up to the cotton contracted for in quality, grade and staple, and they entered into an agreement which, as far as I am able to say, they had a right to enter into committing the decision of that matter to the Board of Arbitration of the Bremen Cotton Exchange. They both signed it and agreed to it, and for a long period of years all their transactions were regulated by it. It seems that no controversy arose between them until the end of the cotton season of 1910-1911. If prior to the controversy in this suit a dispute had arisen between them this record fails to disclose it. Then this controversy came up in which the findings of the Board of Arbitration of the Bremen Cotton Exchange were objected to. An appeal was taken from the finding of that Board and the finding of the Board was affirmed. So that, when the Board of Arbitration of the Bremen Cotton Exchange found that the cotton sold by the Birge-Forbes Company to the German buyers through their agent, Carl R. Heye, failed to correspond in quality, grade and staple to the cotton bought by these buyers, and found that a certain amount of money should be paid by Heye, acting in the sale as the agent of the defendant company and those findings of the Board were affirmed by the Board of Appeals, then it was no longer, in the judgment of the court, a claim for compensation on account of the absence of promised quality in the thing sold, but became like any other claim, an ascertained and determined demand, fixed in its amount and absolute in its obligation. And therefore the court is of the opinion that under these circumstances the six months statute does not apply

and the court is of the further opinion that the claim of the plaintiff is not barred by any statute of limitation, and that plaintiff
183 has a right to recover, and it is my duty to direct a verdict in favor of the plaintiff.

The remaining question is, for how much shall the verdict be? The court as a matter of law is compelled to take judicial knowledge of the fact that a German mark is worth 23-8/10c in American money. It is contended by the defendant company that at this time a German mark is only worth 18⅛c. I have not thought it necessary to investigate any more fully than I have, but I pause here to call attention to the fact that there is no evidence in this record that at the time the plaintiff, Carl R. Heye, paid off the claims of the reclamation claim holders, the German mark was depreciated to any extent. Now ordinarily the measure of liability would be what he paid at the time and place of the payment. The court judicially knows that the normal value of the German mark is 23-8/10c and there is no evidence showing that when Carl R. Heye paid the claims of the reclamation claimholders that the German mark was worth less than 23-8/10c. There is testimony in the record which is undisputed from any source that a party desiring to purchase German Exchange at this time could purchase it estimating the value of a German mark at 18⅛c. The question for me to determine is whether in directing this verdict I shall be governed by the value of the German mark at 23-8/10c, as the court finds it to be, or 18⅛c, as the only witness who has testified to the value of it in the purchase of exchange, states it to be at this time. I am of the opinion that in expressing in this verdict the equivalent in dollars and cents of the German marks paid by the plaintiff to the reclamation claim holders on the 6th of May, 1914, that I
184 should estimate the American money which is expressive of that amount of German marks at the rate of 23-8/10c.

I find therefore that the plaintiff is entitled to recover from the defendant company the amount of money paid by him on May 6th, 1914, which amount in German money was 159,715.97 German marks, and the court finds that the American equivalent of that in American money at the time of the payment, to-wit, May 6th, 1914, was $37,533.25. Now the plaintiff is entitled to interest on that amount from the date of the payment until the rendition of this judgment. The time for which interest should be estimated, according to my recollection, is two years and eight months and the rate per cent at which interest could be calculated is 4%. I therefore calculate the interest at 4% for two years and eight months, which interest, according to my calculation, amounts to $4,003.54, being a total of principal and interest to the date of this trial on this day of $41,536.79. Under the view of the law which the court takes, and the evidence adduced on the trial, I direct the jury to return a verdict for plaintiff for $41,536.79.

Defendant's Objections to Charge of the Court.

After the above instruction was given the jury and before the verdict based thereon was signed and filed the defendant in open court excepted to the court giving such peremptory charge in the following particulars, viz:

1. We except to that part of the charge which has been given which instructs the jury that the judgment of May 23rd, 1913, adjudicated the validity of any of the awards involved in this suit, upon the ground that the evidence does not justify a finding of such adjudication.

185 2. The defendant excepts — that part of the charge which has been given to the jury to the effect that the judgment of May 23rd, 1913, adjudicated that the awards in that suit amounted to $74,334.33; because the evidence does not justify a finding that such adjudication was made, and if such finding was made, it was not necessary to authorize the rendition of the judgment that was rendered.

3. The defendant excepts to that part of the charge which has been given to the jury to the effect that the judgment which was rendered on May 23rd, 1913, adjudicated that the awards that were in controversy in that suit amounted to more than $36,610.96, because the evidence does not justify the finding that such adjudication was made, and because if such adjudication was made, it was not necessary to the rendition of the judgment that was rendered.

4. The defendant excepts to that part of the charge which has been given to the effect that the claims involved in this case were not barred by the laws of limitation in force in Germany, because the evidence which has been introduced does not justify such a finding, but, upon the contrary, shows that said claims were barred by said law.

5. The defendant excepts to that part of the charge which has just been given the jury which instructs them that the value of a German mark, insofar as such value is involved in this suit, was 23-8/10c in American money, because the evidence introduced in this case does not justify such a finding.

We hereby agree that the above is a true and correct bill of exceptions concerning all matters that occurred on the trial of

186 this cause, and that the same contains all the evidence introduced on the trial of said cause, the requested instructions, the full charge of the court given to the jury pertaining to said cause, and the exceptions to the court's charge. We further agree that the same shall be approved by the court without further notice.

LASSITER & HARRISON,
WOOD, JONES & HASSELL,
R. M. ROWLAND,
Attorneys for Plaintiff.
HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Defendant.

Approved and ordered filed this February 21st, 1917.
GORDON RUSSELL, *Judge.*

Endorsed: No. 83. Carl R. Heye vs. Birge-Forbes Co. Bill of exceptions. Filed in the District Court of the United States for the Eastern District of Texas, at Sherman, Feby. 21st, 1917. J. R. Blades, clerk.

Assignment of Errors.

In the District Court of the United States for the Eastern District of Texas.

No. 83. At Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

The defendant in this action, in connection with its petition for writ of error, makes the following Assignment of Errors,
187 which it avers occurred upon the trial of the cause, to-wit:

I.

The court erred in that part of the charge to the jury which instructs them that the judgment of May 23, 1913, adjudicated the validity of any of the awards involved in this suit.

II.

The court erred in that part of the charge which was given to the jury to the effect that the judgment of May 23, 1913, adjudicated that the awards in that suit amounted to Seventy-four Thousand, Three Hundred and Thirty-four and 33/100 Dollars ($74,334.33).

III.

The court erred in that part of the charge given the jury to the effect that the judgment rendered on May 23, 1913, adjudicated that the awards that were in controversy in that suit amounted to more than Thirty-six Thousand, Six Hundred and Ten and 96/100 Dollars ($36,610.96).

IV.

The court erred in refusing defendant's requested instruction, which is as follows:

The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of any of the buyers of cotton

sold by plaintiff as the agent of the defendant, as alleged in plaintiff's petition, and you will, therefore, find in favor of the defendant.

V.

The court erred in refusing defendant's requested instruction, which is as follows:

188 The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of the buyers of cotton sold by plaintiff as the agent of defendant beyond the sum of Thirty-six Thousand, Six Hundred and Ten and 96/100 Dollars ($36,610.96), for which plaintiff recovered judgment on the 23d day of May, 1913, and which judgment is admitted in his pleading to have been paid by defendant, and you will, therefore, return your verdict in favor of the defendant.

VI.

The court erred in refusing defendant's requested instruction, which is as follows:

The judgment of May 23, 1913, in evidence before you was and is an adjudication that defendant was only liable to plaintiff upon the claims or awards set forth in the petition in that case in the amount for which said judgment was rendered, and you will, therefore, find in favor of the defendant.

VII.

The court erred in that part of the charge given to the jury to the effect that the claims involved in this case were not barred by the laws of limitation in force in Germany.

VIII.

The court erred in refusing defendant's requested instruction, which is as follows:

The undisputed evidence in this case shows that whatever cause of action the buyers of the cotton may have had against defendant under the allegations contained in his (plaintiff's) petition became and was barred by limitation under the laws of Germany before the dates he alleges he made the payments for which recovery is sought, and you will, therefore, find in favor of the defendant.

189 IX.

The court erred in instructing a verdict for the plaintiff for Forty-one Thousand, Five Hundred and Thirty-six and 79/100 Dollars ($41,536.79) under the pleadings and facts in this case.

X.

The court erred in refusing defendant's requested instruction, which is as follows:

The evidence in this case is not sufficient to authorize you to find in favor of the plaintiff for any sum whatever, and you will, therefore, return a verdict in favor of defendant.

XI.

The court erred in overruling defendant's motion to quash and suppress the deposition of Oscar Polletin taken in this case.

XII.

The court erred in admitting in evidence in this case the deposition of Oscar Polletin.

XIII.

The court erred in overruling defendant's motion to quash and suppress the deposition of plaintiff, Carl R. Heye, taken in this case.

XIV.

The court erred in admitting in evidence in this case the deposition of plaintiff, Carl R. Heye.

Wherefore defendant prays that the judgment of the District Court may be reversed.

J. F. HOLT,
HEAD, DILLARD, SMITH,
MAXEY & HEAD,
Attorneys for Defendant.

Endorsed: No. 83. At Law. Carl R. Heye, Plaintiff, vs. The Birge-Forbes Company, Defendant. Assignment of Errors. Filed Feb. 21, 1917. J. R. Blades, Clerk U. S. Court, by M. B. Oslin, Deputy.

190 *Petition for Writ of Error.*

The District Court of the United States for the Eastern District of Texas, at Sherman.

No. 83. At Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

And now comes The Birge-Forbes Company, a corporation incorporated under the laws of the State of Texas, defendant herein, and says that on the 2d day of January, 1917, this court entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Fifth Circuit for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. F. HOLT,
HEAD, DILLARD, SMITH,
MAXEY & HEAD,
Attorneys for Defendant.

Endorsed: No. 83. At Law. Carl R. Heye, Plaintiff, vs. The Birge-Forbes Company, Defendant. Petition for Writ of Error. Filed Feb'y 21, 1917. J. R. Blades, Clerk.

191 *Order Allowing Writ of Error.*

The District Court of the United States for the Eastern District of Texas.

No. 83. At Law.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

This 21st day of February, 1917, came the defendant by its attorneys and filed herein and presented to the court its petition praying for the allowance of a writ of error and assignment of errors in-

tended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the defendant's giving bond according to law in the sum of Fifty Thousand Dollars ($50,000.00), which shall operate as a supersedeas bond.

GORDON RUSSELL, *Judge.*

Endorsed: Carl R. Heye vs. The Birge-Forbes Company. Order Allowing Writ of Error. Filed Feb'y 21st, 1917. J. R. Blades, Clerk.

192 *Bond on Writ of Error.*

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. —.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

Know all Men by These Presents, that we, The Birge-Forbes Company, a corporation duly incorporated under the laws of Texas, as principal, and —— —— and —— ——, as sureties, are held and firmly bound unto defendant in error, Carl R. Heye, in the full and just sum of fifty thousand dollars ($50,000.00) to be paid to the said Carl R. Heye, his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, by these presents.

Sealed with our seal and dated this 21st day of February, in the year of our Lord one thousand nine hundred and seventeen.

Whereas lately at a District Court of the United States for the Eastern District of Texas, in a suit pending in said court between Carl R. Heye, plaintiff, and The Birge-Forbes Company, defendant, a judgment was rendered against said The Birge-Forbes Company, and the said The Birge-Forbes Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Carl R. Heye citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals

193 for the Fifth Circuit to be holden at the City of New Orleans in the State of Louisiana, in said circuit, on the 25th day of March next.

Now, the condition of the above obligation is such that if the said The Birge-Forbes Company shall prosecute said writ of error to effect

and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] THE BIRGE-FORBES COMPANY,
By HEAD, DILLARD, SMITH,
MAXEY & HEAD AND
J. F. HOLT,
Attorneys.
N. B. BIRGE.
THOS. FORBES.

Witnessed by:
M. C. DORSET.
J. H. WHARTON.

Approved by:
GORDON RUSSELL,
District Judge.

Endorsed: The Birge-Forbes Company, Plaintiff in Error, vs. Carl R. Heye, Defendant in Error. Bond on Writ of Error. Filed Feby. 21st, 1917. J. R. Blades, Clerk.

Citation.

THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The United States Circuit Court of Appeals for the Fifth Circuit.

To Carl R. Heye, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Fifth
194 Circuit to be holden at the City of New Orleans, in the State of Louisiana, on the 23rd day of March next, pertaining to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Texas, wherein The Birge-Forbes Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Gordon Russell, District Judge of the United States for the Eastern District of Texas, at Sherman, within said Circuit and District, this 23rd day of February, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States of America the one hundred and forty-first.

GORDON RUSSELL,
United States District Judge.

We hereby, this 26th day of February, 1917, accept due personal service of this citation on behalf of Carl R. Heye, defendant in error.

LASSITER, HARRISON & ROWLAND,
J. H. WOOD,
Attorneys for Defendant in Error.

Endorsed: No. 83. The Birge-Forbes Company, Plaintiff in Error, vs. Carl R. Heye, Defendant in Error. Citation. Filed Feby. 21st, 1917. J. R. Blades, Clerk.

195 *Writ of Error.*

THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The United States Circuit Court of Appeals for the Fifth Circuit.

The President of the United States to the Honorable Judge of the District Court of the United States for the Eastern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between Carl R. Heye, plaintiff, and The Birge-Forbes Company, defendant, a manifest error hath happened, to the great damage of the said The Birge-Forbes Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, Louisiana, in said Circuit, on the 23rd day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 21st day of February, A. D. 1917, and in
196 the one hundred and forty-first year of the independence of the United States of America.

Allowed by:
GORDON RUSSELL,
United States District Judge.

Attest:
J. R. BLADES,
Clerk of the District Court of the United States for the Eastern District of Texas.

I hereby certify that a true copy of the above writ has this day been lodged in the Clerk's office for the use of the defendant in error; this 21st day of February, 1917.

J. R. BLADES,
Clerk U. S. District Court.

Endorsed: The Birge-Forbes Company, Plaintiff in Error, vs. Carl R. Heye, Defendant in Error. Writ of Error. Filed Feb'y 21st, 1917. J. R. Blades, Clerk.

197 *Præcipe for Preparation of Record.*

In the District Court of the United States for the Eastern District of Texas, Sitting at Sherman.

No. 83.

CARL R. HEYE, Plaintiff,

vs.

THE BIRGE-FORBES COMPANY, Defendant.

To the Honorable J. R. Blades, Clerk of the United States District Court for the Eastern District of Texas:

Writ of Error having been perfected in the above styled and numbered cause, you are hereby directed to make out and embrace in the record of said cause, the following:

1. Plaintiff's First Amended Original Petition.
2. Defendant's Second Amended Answer.
3. Plaintiff's First Supplemental Petition.
4. Plaintiff's Second Supplemental Petition.
5. Agreement as to certain translations.
6. Verdict of Jury.
7. Judgment of the Court.
8. Motion for time to file Bill of Exceptions.
9. Order granting time to file Bill of Exceptions.
10. Bill of Exceptions.
11. Assignments of Error.
12. Petition for Writ of Error.
13. Order allowing Writ of Error.
14. Bond on Writ of Error.
15. Citation.
16. Writ of Error.
17. Præcipe.
18. Clerk's Certificate.

HEAD, DILLARD, SMITH,
MAXEY & HEAD,
J. F. HOLT,
Attorneys for Plaintiff in Error.

198 *Clerk's Certificate.*

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit and District, aforesaid, do hereby certify that the above and foregoing is a full, true and complete transcript of the record, bill of exceptions, assignments of error and all proceedings in cause No. 83, District Law, wherein Carl R. Heye is plaintiff, and The Birge-Forbes Company is defendant, as fully as same remain on file and of record in my office at Sherman, and that same constitutes the return to the annexed writ of error and citation.

Witness my hand officially and the seal of said court, at Sherman, Texas, this, the 15th day of March, A. D. 1917.

J. R. BLADES, *Clerk*,
By —— ——, *Deputy*.

198½ That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Motion of Plaintiff in Error to Abate Suit or Suspend During Continuance of War with Germany.

Filed November 5th, 1917.

In United States Circuit Court of Appeals, Fifth Circuit.

No. 3065.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

Error to the United States District Court, Eastern District of Texas.

Motion by Plaintiff in Error.

Now comes The Birge-Forbes Company, plaintiff in error herein, and respectfully shows to the court that since the granting of the writ of error herein the defendant in error, Carl R. Heye, has become an alien enemy of the United States of America. That the said Heye, as appears from his own testimony and pleading herein, was at the institution of this suit a citizen and resident subject of the German Empire, and has so remained ever since; and that at the time the writ of error herein was perfected, and the judgment
199 upon which the same is based was rendered, he was a soldier in active service in the German army, and has so remained

to this time, so that when the United States declared war upon the German Kaiser and the German Empire, the said Heye became and has since remained an enemy of the United States of America, and of each citizen therein; and has thereby rendered himself incapable of prosecuting or maintaining a suit in the courts of this country against this plaintiff in error, or any other citizen of the said United States of America.

Wherefore this plaintiff in error moves the court to abate and dismiss this suit, or at least to suspend same until peace is restored between the United States of America and the German Empire; and to make such other orders as may seem just and right to the court.

JESSE F. HOLT,
HEAD, DILLARD, SMITH, MAXEY, & HEAD,
Attorneys for Birge-Forbes Company, Plaintiffs in Error.

Argument.

The authorities bearing upon the question here involved are so exceedingly numerous that it would hardly be profitable to undertake a review of them. We believe no better statement of the principles underlying the decision can be made than is found in the case of Hanger v. Abbot, 6 Wallace, 532, wherein it is said:

"We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right.
200 We preclude him during the war from suing to recover his due for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chit. C. & M. 423. During the war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunal of the one country on the part of the subjects of the other. The Hoop 1 C. Rob. 200; A1 Cinous v. Nigrew, 4 El. L. & Bl. 217. The views of Mr. Wheaton are, and they are undoubtedly correct, that debts friendly contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says in effect that the power of confiscating such debts theoretically exists, though it is seldom, or never, practically exerted; that the right of the creditors to sue for the recovery of the debt is not extinguished; that it is only suspended during the war, and it revives in full force on the restoration of peace. The suspension of the remedy during the war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country; but when the reason for the suspension ceases the right to prosecute revives, and the fact that the right has been suspended constitutes no disability."

Numerous authorities are cited to each of the propositions announced in the opinion.

A very able discussion of the questions here involved will be found in the case of Bishop v. Jones & Petty, 28 Tex. 294, 316, where it is said:

"The right of prosecuting suits by citizens of one friendly power in the courts of another is a well established rule of international comity. This, however, is and in the very nature of things can only be a rule of peace. War terminates all friendly intercourse be-
201 tween the citizens of hostile states. There cannot be, as has been frequently said, 'a war for arms and a peace for commerce.' To suffer individuals to carry on commercial or friendly intercourse while the two governments are at war would be placing the act of the government and the acts of individuals in contradiction with each other. Certainly such antagonism of the citizen to his government cannot receive the sanction or encouragement of its courts, much less will they become instrumental in giving aid and protection to its enemies. It is therefore not to be disputed as a general rule that the resident citizens of one belligerent cannot bring or prosecute a suit in the courts of the other. There are, however, certain exceptions to this general rule as well established as the rule itself.

As we have seen, the general rule depends upon and grows out of the fundamental principle that when the sovereign power of a state declares war against another state it implies that the whole nation declares war, and that all the subjects or citizens of the one are enemies to those of the other, and all intercourse and transactions with those who are enemies of the state is illegal and should be condemned, because it contravenes the object and policy of the government, embarrasses the operation of war and lessens the ability and efficiency of the government in its prosecution."

In conclusion it was held that the effect of the war was only to suspend the prosecution of the suit, as peace had been declared before the court was called upon to decide the appeal, the error of the court below would not require a reversal, as the only effect would be to send the case to the trial court to render the same judgment which had been appealed from.

In the case of Plettenberg, Holthaus & Co. v. I. J. Kalmon & Co., 241 Fed. 605, Speer, District Judge, had occasion to consider
202 the questions here involved in a suit which was commenced before the declaration of war by the United States against Germany, but which he was not called upon to decide until after such declaration. After considering the authorities at some length, including the case of Owens v. Hanney, 9 Cranch. 179, he says:

"My conclusion therefore is that the action should not be dismissed but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

A full discussion of this question, in which authorities by the hundred are cited, will be found in the Co-Operator for June, 1917, in which the conclusion is in accordance with the views above expressed. In that article it is also said:

"According to an early case in the United States Supreme Court

(Owens v. Hanney, 9 Cranch, 180) it would seem that if war breaks out during the pendency of a writ of error the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed. But a recent English case (Porter v. Freudenburg, 1 K. B. 857; Canadian, Stewart Co. v. Terik, 25 Q. B. R. 158; Actien-Gossellschaft Fur. Anilin-Fabrikation v. Levinstein, 31 Times L. R. 225) holds that an alien enemy, who is plaintiff in an action commenced before the outbreak of war, has no right of appeal, such right being suspended until the conclusion of peace.

In 1 Corpus Juris, 117 it is said:

"That plaintiff has become an alien enemy since the commencement of the action does not abate the action, but merely suspends it during the continuance of hostilities, and on removal of the disability it revives in full force."

203 However, in the case of Howes v. Chester, 33 Ga. 89, it is held that under the circumstances indicated above the action should be dismissed; and in the article in the Co-Operator referred to above, it is said:

"In some jurisdictions it has been held that where an action has been commenced before the war the proceeding is only suspended, whereas a suit brought after the commencement of the war will be dismissed, even though if dismissed the statutory period of limitation may possibly run, and so put an end to the action.

In other cases it is held that where the plaintiffs become alien enemies subsequent to the institution of the suit the action should be dismissed, rather than continued on the docket, but the dismissal should be without prejudice. The court will refuse to dissolve an injunction against the enforcement of a judgment where since the injunction has been obtained the judgment creditors have become alien enemies."

Numerous authorities are cited by the author.

The case of Owens v. Hanney, 9 Cranch, referred to above, has sometimes been cited as sustaining the contention that the fact that the plaintiff has become an alien enemy does not prevent the prosecution of the writ of error to final judgment, and even does not prevent the collection of the judgment and the transmission of the proceeds to such enemy. That such contention is entirely inconsistent with all the authorities, unless it be the case referred to, is manifest, and it is believed that that case does not support the construction given it. It is true that in that case the point was made, but the entire opinion consists only of five lines as follows:

"Marshall, Ch. J., states the opinion of the court to be
204 that the omission of the names of the jurors was not material. Nothing was said upon the first point,"

which is the point with which we are concerned.

Notwithstanding Judge Speer, in the case in 241 Fed. referred to above, considered the case of Owens v. Hanney, he did not regard it as controlling the disposition which should be made of the case be-

fore him, nor did the Supreme Court of the United States, in the case referred to above in 6 Wallace, even allude to that case.

If Heye is to be allowed to collect this money, and have it transmitted to him in Germany, it must be after repudiating all of the reasons which have been given against allowing our enemies to maintain themselves from the contributions which we, ourselves, make to them.

Respectfully submitted,

JESSE F. HOLT,
HEAD, DILLARD, SMITH,
MACXEY & HEAD,
Attorneys — Plaintiff in Error
The Birge-Forbes Company.

205 *Opposition of Defendant in Error to Motion to Abate.*

Filed November 8th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3065.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

Error to the United States District Court for the Eastern District of Texas.

Defendant in Error's Opposition to Plaintiff in Error's Motion to Abate the Suit.

The Defendant in error resists the Motion filed by Plaintiff in Error to abate this suit or else suspend any further proceedings with respect to this Writ of Error until the end of the war between the United States and the Empire of Germany. Plaintiff in Error's Motion points out no legal ground and no authority for any such action as it requests in a case where the Plaintiff in the suit did not become an alien enemy until after the rendition of judgment in the Court below.

A reading of the authorities cited by Counsel for Plaintiff in Error in said Motion will disclose that their diligence has not rewarded them with the discovery of a single case holding that it is proper to dismiss or suspend the suit or in any way delay the submission of the cause in the Appellate Court and the affirmance of the judgment below because of the fact that since the rendition of judgment in the trial Court and before time for submission of the case on Writ of Error in the Appellate Court war has intervened between the country of the forum and the country wherein the Plaintiff in the action has his residence and citizenship.

If Counsel for Plaintiff in Error could cite any decisions making such a holding, they would of course be in point here, but it is
206 quite apparent that the authorities they do cite are very much beside the point that is involved.

On the contrary, we find three decisions by very eminent Courts declaring that under such circumstances as exist here the fact of the Plaintiff becoming an alien enemy after the rendition of the judgment in his favor in the trial Court furnishes no reason whatever for the Appellate Court to refuse submission of his case or affirmance and collection of his judgment if no reversible error is found in the record. The case of Owens vs. Hanney, 9 Cranch, 180, is very brief and pointed, and we beg to quote it in full as follows:

"Error to the Circuit Court for the District of Georgia, in an action of assumpsit, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

The plaintiff below is stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia.

A demurrer to the declaration having been overruled, the defendant pleaded non assumpsit, upon which issue the verdict and judgment were against him in May, 1811, and he brought his writ of error.

In the transcript of the record which came up, a blank is left for the names of the jurors, but in other respects the record appears to be perfect. The verdict and judgment are fully stated.

War was declared by the United States against Great Britain on the 18th of June, 1812, and continued at the time of the argument in this court.

Harper, for the plaintiff in error, contended,

1. That as it appeared upon the record that the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and,

2. That the omission of the names of the jurors was fatal inasmuch as it did not appear from the record that it was the verdict of a legal jury.

March 1st. Absent—Todd, J.

Marshall, Ch. J., stated the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point.

Judgment affirmed with costs."

Any efforts to explain away or discredit this decision of the Supreme Court of the United States, announced through the great Chief Justice himself, must be unavailing. We cannot imagine any reason why its authority and binding force should be questioned. Two points were clearly presented to the Supreme Court of the United States by the record in that case, one of which was the very point now before this Court, and the other was the contention that the omission of the names of the jurors in the record was fatal to the validity of the judgment below. Both points were necessarily decided, but only the latter was discussed by Chief Justice Marshall, and that very briefly. The only reason that suggests itself

207 why the discussion was confined to the second point is that the Court deemed it more debatable than the other and that the law with reference to the other was so clear that discussion did not appear to be necessary. Inasmuch as both points were clearly and squarely presented to the Court and both had to be passed upon in order to arrive at an affirmance of the judgment, there is no escape from the conclusion that both points were considered and actually decided by the Court. After diligent search we have been unable to find where the Supreme Court of the United States or any other Court has ever cited with disapproval or questioned the authority of this case of Owens vs. Hanney. On the contrary, we find it cited with approval by the Supreme Judicial Court of Massachusetts, in the case of Kershaw vs. Kelsey, 100 Mass., 561, and by Judge Speer of the United States District Court for the Southern District of Georgia in the case of Plettenberg vs. Kalmon, 241 Fed., 605.

In the case last cited Judge Speer, after discussing the case of Howes vs. Chester, 33 Ga., 89, and expressing his disapproval thereof, said:

"Besides, it seems in conflict with Owens v. Hanney, 9. Cranch, 179, 3 L. Ed., 697. That, too, was a case from this state. The action had been brought by a British subject against a citizen of the United States, and judgment obtained in 1811. An appeal was taken, and war was declared with Great Britain on June 18, 1812, and continued at the time the case was argued in the Supreme Court. It appears from the report that counsel for the American litigant argued that the plaintiff was an alien enemy, and for that reason the court ought not to affirm the judgment against a citizen of the United States. It was affirmed, however, through Chief Justice Marshall.

True, the Chief Justice said nothing on the precise point here involved. It may not, however, be doubted that it was considered by the illustrious jurist, who had been the associate of Patrick Henry in the memorable trial, Ware v. Hylton, 3 Dall., 199, 1 L. Ed., 568, in which they jointly sought to defeat enforcement of the British debts. Besides, with the evolution of law, the courts of the English-speaking peoples exhibit greater magnanimity in affording opportunity of redress to alien enemies. Notwithstanding a ruling of Sir William Scott, afterwards Lord Stowell, made in 1799, to the contrary, the British prize courts of today hear any alien enemy asserting rights under a convention of The Hague Peace Conference. Shall the courts of the United States then wholly deny a hearing to one, not such when he here sought redress, but who has since become an alien enemy? To do this, would not, in my judgment, accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to the German people when it proclaimed war in defense of freedom and of a common humanity.

My conclusion, therefore, is that the action should not be dismissed, but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

In Kershaw vs. Kelsey, 100 Mass., 561, the Supreme Judicial Court of Massachusetts, speaking by Judge Horace Gray, used this language at page 564 of the report:

208 "The reasons assigned by common law judges for the plea of alien enemy are, that an enemy to our government shall not have the benefit and protection of its laws in its courts; and that the fruits of the action may not be remitted to a hostile country, and so furnish resources to the enemy. Hutchinson v. Brock, 11 Mass., 122. Sparenburgh v. Bannatyne, 1 B. & P. 170. M'Connell v. Hector, 3 B. & P., 114. The objection has not beeen much favored; for even in a real action, after the plaintiff has recovered judgment, alien enemy at the time of the original suit is no good plea to scire facias to obtain an execution; West v. Sutton, 2 Ld. Raym., 853; S. C. 1 Salk., 2; Holt, 3; and in a personal action brought by an alien friend, his becoming an enemy by the breaking out of war, which could not have been pleaded earlier, has been held no ground for staying judgment after verdict, or execution after judgment, or affirmance of a judgment on error. Venbrynen v. Wilson, 9 East, 321. Buckley v. Lyttle, 10 Johns., 117. Owens v. Hannay, 9 Cranch, 180."

Another case in point here is Buckley vs. Lyttle, 10 Johns., 117, which was decided by the New York Supreme Court of Judicature while that tribunal was presided over by James Kent, the great Chancellor and Commentator. This opinion is also short and to the point, and we take the liberty of quoting it in full, as follows:

"A motion was made in this cause, in behalf of the defendants, to set aside the execution, on an affidavit, stating that the judgment was obtained prior to the late declaration of war against Great Britain; that the plaintiff is an alien enemy, and resided at the time when the judgment was obtained, and now resides in Canada, within the territory of Great Britain.

Per Curiam: The case of Van Brynen et al. v. Wilson, 9 East, 321, is in point, to show that the court will not interfere, in such a case in this way. In that case the plaintiffs, after verdict, became alien enemies, and the Court of K. B. refused to stay the judgment and execution, on motion. They said 'that if the defendant had any remedy by law, he might avail himself of it, if so advised, but that they would not interfere in the manner proposed, on such an occasion.' The motion must be denied."

The case of Bishop vs. Jones and Petty, cited in plaintiff in error's motion, was, like the other authorities cited in support of said motion, a case where the plea of alien enemy was actually interposed in the trial Court and before judgment rendered. That is, of course, an entirely different situation from the one now before this Court and which was before the Supreme Court of the United States in the case of Owens vs. Hanney. However, it was ruled in said Texas case that even if a state of war had supervened between the filing of the suit and the trial of the case in the Court below, the plea of alien enemy interposed at the trial would not cause the dismissal of the

suit, but only the staying of proceedings until the termination of the war, at which time the prosecution of the suit could be resumed. The Court further held that inasmuch as the war had ended before it was called upon to decide the case upon appeal the error, if such there was, upon the part of the trial Court in not staying the proceedings until the termination of hostilities had become im-
209 material and therefore the Supreme Court affirmed the judgment. The following language quoted from the opinion in that case is in harmony with the other authorities cited by us showing that the plea of alien enemy in these modern and enlightened times is not one favored by the Courts:

"Their plea was merely dilatory, and would only have stayed the appellees' suit until the termination of the war. Though it should be upheld and sustained in cases to which it is applicable when properly presented, yet it is called in the books an 'odious plea' (Clark v. Morey, supra), and it will not, therefore, be aided by construction."

In view of the foregoing decisions, at least two of which are directly in point here, and in view of the fact that counsel for plaintiff in error have been able to cite nothing to the contrary, and in view of the further fact that this Court is strictly a Court of Errors whose sole province is to examine the record sent up from the lower Court and determine whether or not it shows reversible error committed by the trial Court, we think it quite clear that this motion should be overruled.

It further occurs to us that if the Court should take submission of this case and then affirm the judgment in the event no reversible error is found in the record, and thereupon should order that the money due upon the judgment be paid either directly to the "alien property custodian" appointed under the Trading with the Enemy Act of October 6, 1917, and the receipt or acquittance of such officer be filed with the Clerk of the Court below evidencing satisfaction of the judgment, or else should order the judgment to be paid to the Clerk of the trial Court to be by him immediately turned over to said "alien property custodian," and if the proceeds of the judgment should then be invested by the Government in Liberty Bonds, as contemplated by said Act of Congress, and held in such form until the end of the war with Germany, the interests of our country in the present war would be at least as well, and perhaps better, subserved than by permitting the Birge-Forbes Co. to hold the money and refuse payment until the close of the war.

Wherefore, defendant in error prays that said motion be overruled and that, upon affirmance of this judgment in the event no reversible error is found in the record, the Court make such orders or cause such orders to be made by the trial Court with reference to the disposition of the proceeds of the judgment as may be legal and proper in view of the state of war now existing between the United States and Germany.

210 LASSITER & HARRISON,
R. M. ROWLAND,
WOOD, JONES & HASSELL,
Attorneys for Defendant in Error.

Argument and Submission.

Extract from the Minutes of November 8th, 1917.

No. 3065.

BIRGE-FORBES COMPANY

versus

CARL R. HEYE.

On this day this cause was called, and, after argument by H. O. Head, Esq., for plaintiff in error, and Robert M. Rowland, Esq., for defendant in error, was submitted to the Court.

211

Opinion of the Court.

Filed February 11th, 1918.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3065.

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

Error to the United States District Court for the Eastern District of Texas.

Jesse F. Holt (Head, Dillard, Smith, Maxey & Head on brief) for plaintiff in error.

Robert Harrison and Robert M. Rowland (Lassiter & Harrison and Wood, Jones & Hassell on brief) for defendant in error.

Before Walker and Batts, Circuit Judges, and Foster, District Judge.

BATTS, *Circuit Judge:*

Suit by Carl R. Heye, defendant in error, hereinafter called plaintiff, against the Birge-Forbes Company, plaintiff in error, hereinafter called defendant, was filed December 4th, 1914. The petition alleged that plaintiff was a citizen of Germany, and the defendant a Texas corporation; that in 1901, defendant, who was engaged in business of buying, selling and exporting cotton, made a contract with plaintiff, then a cotton broker in Bremen, whereby he

212 became selling agent in that city for defendant; that this relation continued until May, 1911; that the contract provided that all sales were to be made subject to and governed by

Bremen class and arbitration, and the rules of the Bremen Cotton Exchange; that between October 1st, 1910, and about January 1st, 1911, plaintiff made sundry sales for defendant to a number of different buyers; that disputes and controversies arose between the seller and the buyers as to the quality of the cotton sold, the buyers claiming that the cotton delivered was not up to the quality and description offered by defendant, and upon which the prices were based, and that the cotton was not in accordance with the contracts of sale; that these claims and disputes were submitted to arbitration in accordance with the rules of the Cotton Exchange, the final result of such arbitration being awards aggregating 312,749.30 German marks; (an exhibit in detail of these sales and awards was attached to the petition); that in some of the arbitrations, appeals were taken to the appeal committee, and were regularly decided and the results certified, as indicated by another exhibit; that in the arbitration proceedings, defendant was represented by controllers selected by them; that the proceedings were, in all respects, regular and the awards made in good faith, and the defendant duly notified of the results; that by the final determination of the arbitrations, plaintiff, by virtue of his contract, and under the rules of the Exchange, and by the terms of the contracts delivered by him to purchasers of the cotton,
213 became bound and legally liable to pay at once to the purchasers the awards made by the arbitrators; that, on account of the matters alleged, plaintiff brought suit against defendant in the court in which this suit was pending, the suit being No. 156 on the law docket, and, on May 23rd, 1913, recovered a final judgment for $43,082.64, the sum including $36,610.96 that had theretofore been paid by plaintiff to the buyers on the arbitration, $1,730.16 for weight claims and other items mentioned in the pleadings, and interest on those sums to judgment; that this judgment was in full force and effect, and plaintiff averred that it was a binding and conclusive adjudication of the fact that the arbitrations were valid, and that the result of the awards had not been set aside, but remained in force; that after the rendition of the judgment, plaintiff paid the remaining sums due on the awards, towit, $38,209.56. Plaintiff prayed for judgment for this sum, with interest.

Defendant answering, attacked the awards made by the arbitrators, and further pleaded that, under the laws of Germany, each of the claims was barred by limitation, and that if the plaintiff made the payments, as he alleges, he made them long after they were barred as to both the plaintiff and the defendant, and when he was under no legal obligation to pay them.

Judgment was for plaintiff under instructions from the court.

The substantial issues involved in the trial of the case are indicated by the assignments of error of defendant after judgment against it, to the effect that there was error: (1) in charging the jury that
214 the judgment of May 23rd, 1913, adjudged the validity of the awards involved in this suit; and, especially, in charging that that judgment adjudicated awards in excess of $36,610.96; (2) in refusing defendant's requested instruction to the effect that the evidence was not sufficient to authorize the finding that any

awards were rendered in favor of any of the buyers of cotton sold by plaintiff, as agent of the defendant; (3) in the charge that the claims were not barred by the laws of limitation in Germany; (4) in instructing a verdict for plaintiff for $41,536.79; and (5) in overruling the defendant's motion to quash the depositions of Oscar Polletin and Carl R. Heye.

The substantial questions with reference to the validity of the awards by the Bremen Cotton Exchange and the defendant's liability thereon, were involved in the case referred to in plaintiff's petition, No. 156 in the District Court, between the same parties. It appears, however, in that case that only a part of the award for which the plaintiff herein became liable had been paid by him, and the court instructed the jury that the plaintiff could not recover for any part of the amount for which he had become liable, except to the extent that he had actually paid it. He thereupon directed a verdict for the amount so paid, and the jury returned a verdict to this effect: "We find for the plaintiff in the sum of $36,610.96, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with 6% interest on both of said sums from May 1st, 1911." A judgment was entered in which the verdict of the jury was incorporated, and by
215 which it was adjudged that the plaintiff recover of defendant the sum of $43,082.64, with interest, "said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid, and as to which a cause of action in his favor against the defendant has already accrued."

The judgment from which quotations have just been made, considered in connection with the pleadings and the charge of the court and the verdict of the jury, necessarily involve the proposition that the defendant was bound by the awards in arbitration, which were alleged in the petition, and which became the basis of the suit. It is apparent that the only circumstance which prevented the plaintiff from recovering a judgment for the total amount sued for was the fact that while he had become liable to pay the entire amount of the awards, some of the awards had not actually been paid by him. The material and essential issues of law and fact presented in the present case were presented by the pleadings in the previous case—were the subjects of the introduction of evidence, of argument of counsel, of discussion by the court, and were necessarily ruled upon in giving the judgment rendered in that case. If the defendant was not bound by the arbitration awards, the judgment in that case was erroneous. If it was not so bound, the judgment could not have been rendered. The former case necessarily involved a determination of the basic facts essential to recovery in this case. With reference to this matter defendant has had its day in court, and is not entitled to a second determination of it. A judgment is conclusive
216 in a subsequent action between the same parties of all issues definitely adjudicated.

Evidence was introduced to establish the identity of the awards

sued on in this case with the awards which were passed upon in the other case, but for which judgment was not rendered on account of the circumstance that plaintiff had not yet discharged them.

The plea of limitation is based upon sec. 477 of the German Civil Code, to the effect that "the claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of movables in six months after delivery; in the case of land, in one year after the transfer. The period of prescription may be extended by contract." The parties to this suit, in entering into their contract, realized that there would be differences between them and the purchasers with reference to the quality and grade of the cotton sold, and the agreement provided that these matters would be committed to the decision of the board of arbitration of the Bremen Cotton Exchange. No controversy arose with reference to these matters until a number of years after the contract was signed. When they did arise they were submitted to the arbitrators, as contemplated by the contract. The findings of the arbitrators being objected to, an appeal was taken and the finding affirmed. When it was determined by the arbitration and appeal that the cotton sold by the defendant to German buyers failed in quality, grade and staple, and that certain amounts of money should be paid, the awards were no longer claims for compen-
217 sation of the character described by section 477; but had become ascertained and liquidated demands. It has not been made to appear that this provision in the contract was one which could not be legally made. Considering the fact that the parties ultimately liable for deficiencies in grade, etc., resided in a distant country, and that the facts with reference to their liability could not be promptly developed, and that recovery against them, especially on small claims, would have been expensive and difficult, the provision as to arbitration was one which it was perhaps necessary for them to make, in order to successfully conduct their business. The provision enured to the benefit both of their agent and his customers. It took the place of their right to appeal to the courts—a right rendered unsatisfactory, under the circumstances, on account of the short period of limitation. The buyers received what was due to them from Heye, in accordance with the contracts made with them by Heye, under authority from defendant; and, under the contract which gave this authority, he is entitled to be reimbursed. Even if Heye had been in a position to defeat the claims under a plea of limitation, not having so defeated them, but having done that which the contract contemplated that he should do, and which common honesty required he should do, he is entitled to reimbursement from his principal. As between him and defendant, section 477 manifestly has no application.

One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial, the former being 23.8 cents and the latter 18⅛ cents. The

218 purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value.

The depositions of the witnesses Polletin and Heye were apparently taken under the Texas statute. These depositions were not returned directly by the officer taking them, nor directly by anyone to whom he entrusted them. They were taken in Germany and were transmitted to the United States in the only way that was practicable, that is, by giving them to an American Consul, and having them transmitted to the Department of State, and then to the Clerk of the Court through the mail. This was not in absolute accordance with the procedure prescribed by the Texas statute; and it may be, under the strict rules which have been announced in that State, the depositions would have been suppressed. There could be no substantial reason for suppressing these depositions, based upon the fact that they went primarily to an officer of the United States, and then to the State Department, before being entrusted to the mails. No effort is made to attack the integrity of the depositions. The officer who took the depositions certified to them, and enclosed, sealed and addressed them as required by the Texas statute. When
219 they were forwarded Germany was at war. If they had been sent by mail in the ordinary way they would have been exposed to hazards to which packages sent in the manner adopted were not exposed. They would have been liable to seizure and search, involving the opening of the envelopes containing them. A result would have been to make it questionable whether what came to the hands of the Clerk was the depositions as they were when deposited in the mail in Germany. The failure strictly to conform to the statutory method of forwarding the depositions involved no injury to the plaintiff in error. The judgment under review is not to be reversed because of a ruling which was not harmful. Without reference to whether the District Court was correct in the construction given to the stipulation between the attorneys as to the taking of these depositions, we are of the opinion that the overruling of the motion to suppress them was not reversible error.

It is insisted that the claim involved in this suit was a part
220 of the claim set up in the former, and that the allowance therein of part of the claim and the rejection of the balance, was a final adjudication of the whole. This would ordinarily be the effect. Considering, however, the language of the opinion, of the verdict and of the judgment, it sufficiently appears that it was not the purpose to do more than determine that the claim now asserted had not then matured. The holding was that the right was inchoate, and that the cause of action had not yet arisen.

Since the trial of this case the plaintiff has become an alien enemy. Upon the authority of the case of Owens vs. Hanney, 9 Cranch, 180, and Plettenberg vs. Kalmon, 241 Fed., 605, we hold that it is not necessary that the disposition of this appeal be held

in abeyance. We will, however, under the terms of the act known as the "Trading with the Enemy Act," of October 6th, 1917, direct that the judgment be modified to require that the amount of the judgment be paid to the Clerk of the trial court, to be by him turned over to the Alien Property Custodian.

The judgment, modified as indicated, is affirmed.

Modified and affirmed.

(Original Filed February 11th, 1918.)

221 *Judgment.*

Extract from the Minutes of February 11th, 1918.

No. 3065.

THE BIRGE-FORBES COMPANY

versus

CARL R. HEYE.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby modified in conformity to the opinion of this Court, and, as so modified, the said judgment be, and it is affirmed;

It is further ordered and adjudged that the plaintiff in error, Birge-Forbes Company, and the sureties on the writ of error bond herein, N. B. Birge and Thos. Forbes, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Order Amending Judgment.

Extract from the Minutes of February 22, 1918.

No. 3065.

THE BIRGE-FORBES COMPANY

versus

CARL R. HEYE.

The judgment heretofore on the 11th day of February, 1918, rendered in this case is so amended as to be without prejudice to the rights of anyone, not an alien enemy, to establish an interest

222 by proper proceedings in the District Court from which the appeal herein was taken, in the judgment herein rendered, and to have the amount of such interest paid to such person, instead of to the Custodian of alien enemy property.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the fifth Circuit, do hereby certify that the pages numbered from 198 to 222 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in a certain cause in said Court, numbered 3065, wherein the Birge-Forbes Company is plaintiff in error, and Carl R. Heye is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 197 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 1st day of March, A. D. 1918.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States
Circuit Court of Appeals.

223 In the United States Circuit Court of Appeals for the Fifth Circuit.

Number 3065.

BIRGE-FORBES COMPANY, Plaintiff in Error,

versus

CARL R. HEYE, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of Certiorari, I now hereby certify that, on the thirteenth day of May, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"In the Supreme Court of the United States, October Term, 1917.

No. 950.

THE BIRGE-FORBES COMPANY, Petitioner,

versus

CARL R. HEYE, Respondent.

It is hereby stipulated and agreed that the certified transcript of the record which accompanied the application for certiorari, and now on file in the Supreme Court, may be taken as the return of the Clerk of the Circuit Court of Appeals to the writ of certiorari.

This 6th day of May, A. D. 1918.

(Signed) HENRY O. HEAD,
Counsel for Petitioner.

(Signed) NEWTON HOUSE LASSITER,
Counsel for Respondent."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 13th day of May, A. D. 1918.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

224 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Birge-Forbes Company is plaintiff in error, and Carl R. Heye is defendant in error, No. 3065, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit

Court of Appeals and removed into the Supreme Court of the
225 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26417. Supreme Court of the United States, No. 950, October Term, 1917. The Birge-Forbes Company vs. Carl R. Heye. Writ of Certiorari. Filed 10th day of April, 1918. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

226 [Endorsed:] 950. 26417. No. 3065. United States Circuit Court of Appeals for the Fifth Circuit. Birge-Forbes Company, Plaintiff in Error vs. Carl R. Heye, Defendant in Error. Writ of Certiorari, and Return Thereto.

227 [Endorsed:] File No. 26417. Supreme Court U. S., October Term, 1918. Term No. 400. Birge-Forbes Co., Pl'ff in Error, vs. Carl R. Heye. Writ of certiorari and return. Filed May 16, 1918.

Office Supreme Court, U. S.
FILED
APR 4 1918
JAMES D. MAHER,
CLERK.

No. 340-176

IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, PETITIONER,

VS.

CARL R. HEYE, RESPONDENT.

PETITION FOR CERTIORARI.

JESSE F. HOLT,
HEAD, DILLARD, SMITH, MAXEY & HEAD,
Attorneys for Petitioner, The Birges-Forbes Company.

JESSE F. HOLT,
HENRY O. HEAD,
Of Counsel.

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IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, PETITIONER,

VS.

CARL R. HEYE, RESPONDENT.

PETITION FOR CERTIORARI.

To the Honorable Supreme Court of the United States:

The Birge-Forbes Company, a corporation, and a citizen of the State of Texas, with its domicile and place of residence in the City of Sherman, in the Eastern District of said State, hereinafter called petitioner, complaining of Carl R. Heye, a citizen of the German Empire, with his domicile and place of residence in the City of Bremen, submits this its application for a writ of certiorari to review a decision of the Honorable District Court for the Eastern District of Texas, and a decision of the Honorable Circuit Court of Appeals of the United States for the Fifth Circuit, modifying and affirming same, and files herewith as an exhibit to this petition, a certified copy of the entire transcript of the record in this cause, including the proceedings in the Circuit Court of

Appeals, and also files herewith the necessary printed copies of said record, and brief in support of this application, and makes, as required by the rules, the following

Summary and Short Statement of the Matters Involved, and the General Reasons Relied Upon for Asking for a Writ of Certiorari.

I.

Petitioner is a citizen of the State of Texas, and respondent is an alien, being a citizen of the German Empire, and jurisdiction in the trial court attached solely by reason of the diverse citizenship of the parties, and the judgment of the Honorable Circuit Court of Appeals is therefore final.

II.

This is an action at law by respondent against petitioner to recover upon about 150 awards alleged to have been rendered under the rules of the Bremen Cotton Exchange, in Bremen, Germany, against petitioner, for difference in the quality of cotton sold by respondent as agent of petitioner to the various persons and firms in whose favor said awards are alleged to have been made. Respondent claims to have paid these awards as surety, or guarantor, of petitioner. the alleged awards were each for small amounts (Rec. 11-17), but respondent claims amounted in the aggregate to 312,749.30 German marks, equivalent to $74,820.52 American money (Rec. 4). A former suit was filed by respondent to recover of petitioner the full amount of 312,749.30 German marks, or $74,820.52, their equivalent, which respondent claims

was based upon these same awards, and a verdict and judgment was, on the 23d day of May, 1913, rendered in that suit as follows:

> "On this 19th day of May, 1913, this cause came on to be heard, and both parties appeared and announced ready for trial. Then came a jury of twelve lawful men, viz., H. H. Chesnutt, and eleven others, who were duly empaneled and sworn to try the cause. After hearing the evidence and the arguments of counsel as to the law of the case, the court on the 23d day of May, 1913, directed a verdict, and thereupon the jury delivered in open court the following verdict, to-wit:
>
> 'We, the jury, under directions of the court, find for the plaintiff in the sum of seventeen hundred and thirty and 16/100 dollars for deficiencies in weight, etc., of cotton, and the further sum of thirty-six thousand, six hundred and ten and 96/100 dollars, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest per annum on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars. Sherman, Texas, May 23d, 1913, H. H. Chesnutt, Foreman.'
>
> It is therefore considered and adjudged by the court, in pursuance of said verdict, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, the Birges-Forbes Company, a private corporation, the sum of forty-three thousand eighty-two and 64/100 (43,082.64) dollars with interest thereon from this date at the rate of six per cent per annum, said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid and as to

> which a cause of action in his favor against the defendant has already accrued. It is further considered and adjudged by the court that plaintiff recover of defendant all costs of this suit and that he have his execution for the enforcement of this judgment" (Rec. 135-6).

That judgment, and the depositions of respondent and Oscar Polletin, which were admitted over the objection of petitioner, was all the evidence introduced in the trial court to establish respondent's allegation that the particular awards sued upon in this case had been rendered, or the aggregate amount thereof. The depositions referred to only go to the extent of identifying the awards sued upon in this case as being the same that were involved in the suit in which the judgment copied above was rendered, and do not attempt independently to prove the rendition of said awards or the amount thereof. In the absence of said deposition there would be nothing in the record to connect the awards involved in this case with those involved in the case in which the judgment was rendered.

Petitioner filed preliminary motion to quash both depositions upon the ground that they were attempted to be taken in a foreign country under the Act of 1892 without authority, and were not returned in compliance with the requirements of the State Statute, and the additional objection to the deposition of the respondent, Heye, was made that there is no authority for taking the deposition of a party to the suit previous to the trial, for use in a Federal Court (Rec. 61-2). The Circuit Court of Appeals concedes that under the Texas decisions the

depositions would have to be excluded on account of the manner they were returned, but holds that a failure to return depositions taken under the Act of 1892, in the manner required by the State Statute, is not ground for excluding the depositions in a Federal Court, unless injury is shown to have resulted to the complaining party from the manner they were actually returned. In other words, that the decisions of the State Courts construing the State Statute and the effect of not complying with it are not controlling upon the Federal Court. That court did not, in its opinion, express its views upon whether the depositions of witnesses in a foreign country can be taken without first obtaining authority from the court under Article 1477, nor upon whether the Acts of Congress authorize the taking of the deposition of a party to the suit in advance of the trial, but the effect of the decision is to hold against petitioner on both questions.

Respondent's petition in the trial court shows that the alleged awards were, in terms, in German marks, and no evidence was introduced to prove the value of German marks in American money, either at the time of the trial, or at the time of the alleged payments by respondent, and especially was no evidence introduced to prove such value in Texas at either of said times. The Circuit Court of Appeals holds that in the absence of evidence to the contrary, the value was properly assumed to be the nominal, or par value. In other words, that foreign currency, in the absence of evidence to the contrary, will be presumed to be the same in Texas that it is in the

country that issued it, thereby taking the burden from a plaintiff who sues upon an obligation payable in the currency of a foreign country, and placing it upon the defendant.

In its answer petitioner in addition to its general denial, and allegations of fraud in procuring each of the awards which were rendered against it, alleged that when respondent paid the several awards the claims of the several parties thereon were barred by the German Statute of limitations, both as to petitioner, and as to respondent, and that such payments by respondent were voluntary, for which he can not hold petitioner liable, and petitioner introduced the evidence of an expert in German law who testified that such was the effect of the German Statute, (Rec. 144-152), and also introduced the Statute itself (Rec. 145-146). The Circuit Court of Appeals holds that that Statute does not apply where the claims are established by the awards of arbitrators, and also that even if the claims were barred respondent was not required to rely upon the Statute, but had the right to pay the claims and hold petitioner for reimbursement.

Preliminary to proceeding with the case in the Circuit Court of Appeals, petitioner filed a motion calling the attention of the court to the fact that since the trial in the court below, respondent had become an alien enemy engaged in active hostilities against the Government of the United States, and asking that proceedings be stayed until the termination of the war. The court declined to do this, but ordered the money to be paid to the clerk of the trial court, and by him turned over to the custodian of the property of alien enemies.

The question for decision, and the reasons relied upon for asking for the allowance of the writ will therefore be stated in logical order, but not in the order of their importance, in general terms, as follows:

(a)

What is the proper practice in the Circuit Court of Appeals in a case where the defendant in error has become an alien enemy pending the appeal? Should the court suspend the proceedings until the termination of the war, or should it proceed with the hearing, and in case the judgment is affirmed stay the mandate until the Supreme Court acts upon an application for a writ of error, or certiorari, and upon the refusal of these return the mandate to the District Court, with direction to enter judgment on the supersedeas bond and issue execution and collect the money, as in ordinary cases?

(b)

The court erred in holding that the depositions of the plaintiff, Heye, and his witness, Oscar Polletin, were properly admitted in evidence.

This involves the following subsidiary questions:

(1) Do the Acts of Congress authorize the taking of the depositions of parties to the suit in advance of the trial?

(2) Does the Act of 1892 authorize the taking of *de bene esse* depositions of witnesses in a foreign country, without obtaining authority from the court under Article 1477, or is the Act of 1892 restricted to the

mode of taking the depositions after the necessary authority has been obtained?

(3) Did the court err in holding that departure from the statutory requirements in reference to taking and returning *de bene esse* depositions does not necessitate their exclusion unless injury is shown to have resulted in the complaining party?

(4) Are the Federal Courts bound by the decisions of the State Court with reference to the construction of the State Statute, and the effect of non-compliance therewith, where the deposition in the Federal Court has been attempted to be taken under the Act of 1892?

(c)

Even if it be held that the depositions of respondent, and his witness, Polletin, were properly admitted, the court erred in holding that the judgment of May 23, 1913, adjudicated that petitioner was indebted to respondent upon the awards sued upon, in the sum of 312,749.30 German marks, or its equivalent, $74,333.33, or in any sum other than $36,610.96, for which said judgment was rendered.

(d)

The court erred in holding that the claims which respondent alleges he paid as surety for petitioner, were not barred by the German law of limitations.

(e)

The court erred in holding that, in the absence of evidence to the contrary, the value of German marks in Texas in American money should be assumed to be the

same as their normal or par value in Germany, and that the burden was on the defendant to rebut this presumption by evidence.

The attorneys for the respondents are Messrs. Lassiter & Harrison, a partnership composed of Newton H. Lassiter and Mr. R. W. Harrison, and by Mr. R. M. Rowland, all of whom reside in Tarrant County, Texas, and by Messrs. Wood, Jones & Hassell, a partnership composed of Judson H. Wood, Ben L. Jones and Jefferson W. Hassell, all of whom reside in Grayson County, Texas.

Wherefore petitioner prays that this, its petition for certiorari be granted, and that this court proceed as is provided by law and the rules of the court in such cases, and that upon final hearing the judgments of the trial court and of the Circuit Court of Appeals be reversed, and the cause remanded with proper instructions for a new trial.

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BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI.

In case of The Birge Forbes Company, Petitioner, v. *Carl R. Heye, Respondent.*

With reference to the practice which should be observed by the Circuit Court of Appeals in cases where one of the parties becomes an alien enemy pending the appeal, we believe no better statement of the principles underlying the decisions can be made than is found in the case of *Hanger* v. *Abbot*, 6 Wallace, 532, wherein it is said:

> "We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during the war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chit. C. & M. 423. During the war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunal of the one country on the part of the subjects of the other. The Hoop, 1. c. Rob. 200; *Al Cinous* v. *Nigrew*, 4 El. L. & Bl. 217. The views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says in effect that the power of confiscating such debts theoretically exists, though it is seldom, or never, practically exerted; that the right of the cred-

itors to sue for the recovery of the debt is not extinguished; that it is only suspended during the war, and it revives in full force on the restoration of peace. The suspension of the remedy during the war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country; but when the reason for the suspension ceases the right to prosecute revives, and the fact that the right had been suspended constitutes no disability."

Numerous authorities are cited to each of the propositions announced in the opinion.

A very able discussion of the questions here involved will be found in the case of *Bishop* v. *Jones & Petty*, 28 Tex. 294, 316, where it is said:

> "The right of prosecuting suits by citizens of one friendly power in the courts of another is a well established rule of international comity. This however, is and in the very nature of things can only be a rule of peace. War terminates all friendly intercourse between the citizens of hostile states. There cannot be, as has been frequently said, 'a war for arms and a peace for commerce.' To suffer individuals to carry on commercial or friendly intercourse while the two governments are at war would be placing the act of the government and the acts of individuals in contradiction with each other. Certainly such antagonism of the citizen to his government cannot receive the sanction or encouragement of its courts, much less will they become instrumental in giving aid and protection to its enemies. It is therefore not to be disputed as a general rule that the resident citizens of one belligerent cannot bring or prosecute a suit in the courts of the other. There are, however, certain exceptions to this general rule as well established as the rule itself.

> "As we have seen, the general rule depends upon and grows out of the fundamental principle that when the sovereign power of the state declares war against another state it implies that the whole nation declares war, and that all the subjects or citizens of the one are enemies to those of the other, and all intercourse and transactions with those who are enemies of the state is illegal and should be condemned, because it contravenes the object and policy of the government, embarrasses the operation of war and lessens the ability and efficiency of the government in its prosecution."

In conclusion it was held that the effect of the war was only to suspend the prosecution of the suit, and as peace had been declared before the court was called upon to decide the appeal, the error of the court below would not require a reversal as the only effect would be to send the case to the trial court to render the same judgment which had been appealed from.

In the case of *Plettenberg, Holthaus & Co.* v. *I. J. Kalmos & Co.* 241 Fed. 605, Speer, District Judge, had occasion to consider the questions here involved in a suit which was commenced before the declaration of war by the United States against Germany, but which he was not called upon to decide until after such declaration. After considering the authorities at some length, including the case of *Owens* v. *Hanney*, 9 Cranch. 179, he says:

> "My conclusion therefore is that the action should not be dismissed but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

A full discussion of this question, in which authorities by the hundred are cited, will be found in the Co-Operator for June, 1917, in which the conclusion is in accordance with the views above expressed. In that article it is also said:

> "According to an early case in the United States Supreme Court (*Owens* v. *Hanney*, 9 Cranch, 180) it would seem that if war breaks out during the pendency of a writ of error the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed. But a recent English case (*Porter* v. *Freudenburg*, 1 K. B. 857; *Canadian, Stewart Co.* v. *Terik*, 25 Q. B.R. 158; *Actien-Gossellschaft Fur. Anilin-Frabikation* v. *Levinstein*, 31 Times L. R. 225) holds that an alien enemy, who is plaintiff in an action commenced before the outbreak of the war, has no right of appeal, such right being suspended until the conclusion of peace."

In Corpus Juris, 117, it is said:

> "That plaintiff has become an alien enemy since the commencement of the action does not abate the action, but merely suspends it during the continuance of hostilities, and on removal of the disability it revives in full force."

However, in the case of *Howes* v. *Chester*, 33 Ga. 89, it is held that under the circumstances indicated above the action should be dismissed; and in the article in the Co-Operator referred to above, it is said:

> "In some jurisdictions it has been held that where an action has been commenced before the war the proceeding is only suspended, whereas a suit brought after the commencement of the war will be dismissed, even though if dismissed the statutory

> period of limitation may possibly run, and so put an end to the action.
>
> In other cases it is held that where the plaintiffs become alien enemies subsequent to the institution of the suit the action should be dismissed, rather than continued on the docket, but the dismissal should be without prejudice. The court will refuse to dissolve an injunction against the enforcement of a judgment where since the injunction has been obtained the judgment creditors have become alien enemies."

Numerous authorities are cited by the author.

The case of *Owens* v. *Hanney*, 9 Cranch, referred to above, has sometimes been cited as sustaining the contention that the fact that the plaintiff has become an alien enemy does not prevent the prosecution of a writ of error to final judgment, and even does not prevent the collection of the judgment and the transmission of the proceeds of such enemy. That such contention is entirely inconsistent with all the authorities, unless it be the case referred to, is manifest, and it is believed that that case does not support the construction given it. It is true that in that case the point was made, but the entire opinion consists only of five lines as follows:

> "Marshall, Ch. J., states the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point,"

which is the point with which we are concerned.

Notwithstanding Judge Speer, in the case in 241 Fed. referred to above, considered the case of *Owens* v.

Hanney, he did not regard it as controlling the disposition which should be made of the case before him, nor did the Supreme Court of the United States, in the case referred to above in 6 Wallace, even allude to that case.

We regard the question of general importance outside of its bearing upon the instant case.

By the assignment which calls in question the action the action of the court in admitting the depositions of Heye and Polletin, several important questions are presented:

First: Do the acts of congress authorize the taking of the deposition of a party to a case at law in the Federal Court in advance of the trial?

Art. 1464 of the Compiled Statutes, being the Act of 1906, reads:

> "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

That Act repealed, or superseded, the Act of 1864, which provided that no witness should be excluded on account of his color or because of his being a party to the suit.

The Texas statute reads:

> "Art. 3688. No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue tried."

Art. 1472 of the Compiled Statutes of the United States provides for the taking of *de bene esse* depositions in the limits of the United States but it has been many times decided that this Article does not authorize the taking of such depositions in foreign countries, and that authority for taking depositions in foreign countries must be obtained from the court under Article 1477, which reads:

> "In any case when it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatum* to take depositions according to common usage."

A commission under this section is not granted as a matter of course, but is confided to the judicial discretion of the court, who takes into consideration the importance of the evidence, the inconvenience and expense of procuring the deposition and all other circumstances. *U. S.* v. *Parratt*, Fed. Cas. No. 15,999. No attempt was made to procure the deposition under this article, sole reliance being placed upon the Act of 1892, which reads:

> Compiled Code, Art. 1476. "In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

As to whether these statutes authorize the taking of depositions of parties to the suit before the trial, or are confined to ordinary witnesses, there is much difference

of opinion. District Judge Finkelnberg, of the Eastern District of Missouri, in *Blood* v. *Morrin*, 140 Fed. 918, holds that the depositions of parties who reside over 100 miles from the place of trial, since the Act making them competent witnesses, can be taken under the same circumstances as the depositions of ordinary witnesses. On the other hand, the intimations are very strong in *Hanks Dental Association* v. *International Tooth Crown Co.*, 194 U. S. 303; *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250, and Ex Parte Fiske 113 U. S. 724, that the testimony of parties to suits can not be taken in advance of the trial, and that their testimony is governed by Compiled Code, Art. 1468, which reads: "The mode of ~~trial~~ trial in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and Judge Lacombe, in *Frost* v. *Barber*, 173 Fed. 847, holds that the federal practice does not permit the examination of a party before the trial. His language is:

> "The federal practice does not permit examination of a party before trial. *Hanks Dental Association* v. *International Tooth Crown Co.*, 194 U. S. 303. The object of Section 863, Rev. St. is not to enable a party to ascertain, in advance of the trial, what will be the testimony of some particular witness, but solely to secure him against going to trial without the testimony of every witness whom he believes he should call or examine."

The effect of the decision in the instant case in holding the deposition of plaintiff, Heye, to have been properly admitted is with Judge Finkelnberg, although the

question is not discussed. The extent to which opinions differ upon this question is well illustrated by the following quotation from Simpkins' A Federal Equity Suit, 3rd Edition, 506 *et seq.*:

> *"When State Permits Depositions in Advance of the Issues.*
>
> By the act of March 9, 1892, it was provided by Congress that the practice in the State Courts in issuing depositions may be pursued in the Federal courts. In many of the States depositions may be taken at any stage of the case, but the provisions of these statutes authorizing depositions in advance of the issues do not apply to the Federal courts. The act of 1892 has been frequently construed, and with few exceptions it has been held that State statutes are only to be followed in the manner of taking, and do not apply to the grounds for taking depositions. *United States* v. 50 *Boxes & Packages of Lace*, 92 Fed. 601; *Hanks Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 309, 48 L. Ed. 991, 24 Sup. Ct. Rep. 700, reviewing cases; *Zych* v. *American Car & Foundry Co.*, 127 Fed. 953; *National Cash Register Co.* v. *Leland*, 37 C. C. A. 372; 94 Fed. 502; *Pullman Co.* v. *Jordan*, 134 C. C. A. 301, 218 Fed. 574. Congress, it is held, did not enlarge the conditions under which they may be taken for use in the Federal courts. *Ibid.*; *Ex parte Fiske*, 113 U. S. 713-725, 28 L. Ed. 1117-1121, 5 Sup. Ct. Rep. 724; *Shellabarger* v. *Oliver*, 64 Fed. 307, 308; *Despaux* v. *Pennsylvania R. Co.*, 81 Fed. 897; *Magone* v. *Colorado Smelting & Min. Co.*, 135 Fed. 846. In *Ex parte Fiske*, the Supreme Court held that section 914 of the United States Revised Statutes (Comp. Stat. 1913, sec. 1537), conforming the practice of the Federal courts on the common-law side to the practice of the State courts, did not include an author-

ity to take the depositions of a defendant under oath before trial; that to do so was in conflict with U. S. Rev. Stat. Sec. 861 (Comp. Stat. 1913, Sec. 1468). *Ibid.; United States* v. 50 *Boxes & Packages of Lace*, 92 Fed. 601; *National Cash Register Co.* v. *Leland*, 94 Fed. 502; *Hanks Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 306, 48 L. Ed. 990, 24 Sup. Ct. Rep. 700. This was a construction of a New York law permitting an examination of a party as a witness in advance of the trial. This case was followed in construing the act of 1892, with the result as above stated, and it may be stated that the Texas statute (from 2273 to 2293), insofar as it permits depositions in advance of the issues to be taken does not apply in trials in Federal courts, and this whether the suit be in law or equity. *Shellbarger* v. *Oliver*, 64 Fed. 307, 308; *National Cash Register Co.* v. *Leland*, 77 Fed. 242.

In the light of these decisions, then, depositions in advance of the issues joined cannot be taken in the Federal courts unless coming within the provisions of equity rule 47 and the statutes of the United States, Sections 863, 866 and 867, as these acts were not in any way added to or modified by the act of 1892. Congress would have so stated in apt words if so intended, is the language of the decisions. *Blood* v. *Morrin*, 140 Fed 919.

The Federal courts have never permitted a party to use depositions for the purpose of fishing for information, or to force a party to disclose his case by pumping him, or his witnesses out of time. *Ibid. Flower* v. *MacGinniss*, 50 C. C. A. 291, 112 Fed. 377; *Despeaux* v. *Pennsylvania R. Co.*, 81 Fed. 897; *National Cash Register Co.* v. *Leland*, 77 Fed. 242; *Hanks, Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 306, 48 L. Ed. 990, 24 Sup. Ct. Rep. 700. A contrary view has been strenuously insisted upon by Judge Lacombe of the

second circuit in construing the Act of 1892 (*International Tooth Crown Co.* v. *Hanks Dental Asso.*, 101 Fed. 306; *International Tooth Crown Co.* v. *Carter*, 112 Fed. 396), and by Judge Hanford in *Smith* v. *Northern P. R. Co.*, 110 Fed. 342, but the rule as stated has been decided in the fifth circuit. *Texas & P. R. Co.* v. *Wilder*, 35 C. C. A. 105, 92 Fed. 958; *United Lace & Braid Mfg. Co.* v. *Barthels Mfg. Co.*, 213 Fed. 536. See *Curtis* v. *Phelps*, 209 Fed. 263."

But conceding that Judge Finkelnberg's decision is correct in its application to witnesses who reside in the United States, the question still remains whether it is correct as applied to parties and witnesses who reside in foreign countries. We have seen that in the absence of the Act of 1892, authority to take the deposition of a witness in a foreign country must be obtained from the court, who in granting or withholding the permission will take into consideration the importance of the evidence, the inconvenience and expense, and the other circumstances, and the question is does the Act of 1892 made the right to take such depositions a matter of absolute right, or is it restricted to the mode or manner of taking the deposition after authority to take it has been secured from the court?

We respectfully submit that the important questions of practice here involved should be set at rest by an authoritative decision by this court.

But even if it be held that our position on what has heretofore been said with reference to the depositions of respondent and Polletin is not sound, the exceedingly important question as to what is the effect, in the Federal courts, of a failure to take and return depositions attempted to be taken under the Act of 1892 in compliance with the statutory requirements of the state in which the court is being held, still remains. This question applies both to the deposition of plaintiff, Heye, and that of his witness, Oscar Polletin. This involves also a consideration of the question to what extent the Federal courts should be governed by the decisions of the State Court on the effect of a failure to comply with particular provisions of the state statute. It will be observed that the Act of 1892 only admits a deposition, even when taken in this country, when it has been taken "in the mode prescribed by the laws of the state in which the courts are held," and the first question is how is a Federal Court to determine when the state law has been complied with? Both the trial court and the Circuit Court of Appeals in this case seemingly hold that when the deposition is not returned in compliance with the statutory requirements the burden is on the complaining party to show that he has suffered injury from the manner in which they were returned. In other words, that the court has the power to substitute for the statutory requirements another *mode* which it thinks "is just as good." That this is in conflict with the view announced by the Circuit Court of Appeals in *Pullman Co.* v. *Jordan*, 218 Fed. 573, seems clear. In that case it is said:

> "The plaintiff below in the proceedings adopted, for securing the testimony of Dr. John A. Lenfestey, elected, as under the statute he had the right to do, to follow the mode prescribed by the laws of Alabama, the state in which the court was held. Having so elected, it was incumbent upon him to proceed in conformity with the requirements of the state law as to the mode of procuring the depositions. Compiled Statutes 1913, Sec. 1537."

We do not understand that there is any claim that the depositions in question were returned in compliance with the state statutes. The Circuit Court of Appeals in its opinion says:

> "The depositions of the witnesses Polletin and Heye were apparently taken under the Texas statute. These depositions were not returned directly by the officer taking them, nor directly by anyone to whom he entrusted them. They were taken in Germany and were transmitted to the United States in the only way that was practicable, that is, by giving them to an American Consul, and having them transmitted to the Department of State, and then to the clerk of the court through the mail. This was not in absolute accordance with the procedure prescribed by the Texas Statute; and it may be, under the strict rules which have been announced in that state, the depositions would have been suppressed. There could be no substantial reason for suppressing these depositions, based upon the fact that they went primarily to an officer of the United States, and then to the State Department, before being entrusted to the mails. No effort is made to attack the integrity of the deposition. The officer who took the depositions certified to them, and enclosed, sealed and addressed them as required by the Texas statute. When they were forwarded

Germany was at war. If they had been sent by mail in the ordinary way they would have been exposed to hazards to which packages sent in the manner adopted were not exposed. They would have been liable to seizure and search, involving the opening of the envelopes containing them. The result would have been to make it questionable whether what came to the hands of the clerk was the depositions as they were when deposited in the mail in Germany. The failure strictly to conform to the statutory method of forwarding the depositions involved no injury to the plaintiff in error. The judgment under review is not to be reversed because of a ruling which was not harmful."

The section of the Texas Statute applicable reads:

"Art. 3660. (2284) (2229) Execution of the commission. Upon the appearance of the witness, the officer to whom the commission is directed shall proceed to take his answers to the interrogatories. The answers shall be reduced to writing, and shall be signed and sworn to by the witness. The officer shall certify that the answers of the witness were signed and sworn to by the witness before him, and shall seal them up in an envelope, together with the commission and interrogatories and cross interrogatories, if any, and shall write his name across the seal, and indorse on the envelope the names of the parties to the suit and of the witnesses, and shall direct the package to the clerk of the court from which the commission issued; and, if the depositions be sent by mail, the officer taking the same shall certify on the envelope enclosing the depositions that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited for transmission."

The depositions were not sent by mail direct to the clerk as required by this statute, but were returned through the consular service (Rec. 97-98).

The officer who took the depositions did not "certify on the envelope enclosing the depositions that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited," but on the contrary did certify on the envelope that he "deposited this package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission" (Rec. 98). The plan thus adopted by the German notary may have been just as good, or even better, than the plan adopted by the Texas Legislature, and the United States Congress, but it was not the same, and the plan which the next German notary adopts, if it is left for them to choose, may not be the same as the one adopted by this one, or even as good as the Texas law, but if the decision in this case prevails the depositions will still be admitted unless the complaining party is able to show they have been tampered with. That this is not in accord with the Texas decisions, must be conceded, and is conceded by the opinion rendered by the Circuit Court of Appeals copied above.

In *Garner* v. *Cutler*, 28 Texas, 175, it is said:

> "The taking of testimony by depositions is a departure from the common-law rules of evidence. It has, therefore, always been held, that the statutory rules permitting the same, must be fully and fairly, if not strictly, complied with, and if this be

not done, such testimony unquestionably should be excluded.

"The statute prescribes, that the party desiring to take the deposition of a witness, whose testimony may be presented in this manner, shall give notice to the opposite party of the name and residence of the witness whose testimony he proposes to take. This requirement was without doubt intended to secure valuable and important rights to the party in whose behalf it is provided. Without, however, speculating upon this, it is sufficient to say, that if the name and residence have not in fact been given, the deposition is not taken in manner and form as required by law, and should be excluded for that reason, if objection to it be properly made."

In *Laird* v. *Ivens*, 45 Tex. 621, it is said:

"The appellant, who was the defendant in the District Court, made a motion in writing, which was overruled before the trial of the cause, to suppress the depositions of Edmond M. Ivens, taken by the plaintiff, 'Because there is no certificate on the package or envelope inclosing said depositions, by the postmaster at New Orleans, Louisiana, showing from whom the said depositions were received by him.'

"It appears by the indorsement on the envelope that the depositions were taken by 'Alfred Ingram, Commissioner for the State of Texas, at New Orleans, Louisiana.' The deputy postmaster made the following indorsement on the envelope, to-wit: 'Received at New Orleans post office July 20, 1874; to be forwarded by mail. W. H. Worker, Dep. P. M.'

"The statute requires that if the depositions be sent by mail, 'the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hand of the officer before whom they

were taken.' This means, as we understand it, that in this case the deputy postmaster should have indorsed that he received the package from 'Alfred Ingram, Commissioner,' because he appeared, from the indorsement on the sealed package, to be the person who had taken the depositions, and that was likely to be the only means of his knowing who had taken them. And if the postmaster should happen to know who did take the depositions, apart from what appears on the envelope, which would not often be the case, still it would be better for him to state in his endorsement the name of the person from whom he received the package to be worwarded by mail, as that was evidently the intention of the statute, upon a reasonable construction of it, considering the manner in which such business is usually transacted. (Paschal's Dig., Art. 3729.) The statute was not complied with substantially in this case.

"It has uniformly been held that there must be a strictly substantial compliance with the statute in taking depositions and in the form and manner of returning, when exceptions are taken in writing and notice thereof given before the trial. (Paschal's Dig., Art. 3741); *Garner* v. *Cutler*, 28 Tex. 181.

"We are of opinion that the court erred in overruling the motion of defendant to suppress or exclude these depositions of E. M. Ivens thus returned into court in this case."

In *Barber* v. *Greer*, 94 Tex. 581, 584, it is said:

"Art. 2284 Revised Statutes prescribe the manner of taking and returning depositions in these words:

'Upon the appearance of the witness the officer to whom the commission is directed shall proceed to take his answers to the interrogatories. The

answers shall be reduced to writing and shall be signed and sworn to by the witness. The officer shall certify that the answers of the witness were signed and sworn to by the witness before him, and shall seal them up in an envelope together with the commission and interrogatories and cross interrogatories, if any, and shall write his name across the seal and endorse on the envelope the names of all parties to the suit, and of the witnesses, and shall direct the package to the clerk of the court, or justice of the peace from which the commission issued. The object of this statute is to have the endorsement made upon the outer cover of the package containing the deposition so that when the clerk of the court to which the deposition is returned shall receive it, he will know in what case to file the paper, and also who is entitled to have it opened for examination. Returned in the manner the deposition was in this case, the clerk could not know that it was a deposition, nor in what case, and could not properly open it at the request of any person, because it was impossible for him to tell to what suit in that court it belonged. These requirements are strictly statutory, and must be substantially complied with."

The Act of Congress only admits depositions such as these which have been taken in the *mode* prescribed by the State Statute, and certainly the construction of that statute is for the state courts. As said by Justice Brewer in *Smiley* v. *Kansas*, 196 U. S. 447, 445:

> "We accept the construction given to a state statute by that court. * * * The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

The case of *Consolidated Refining Co.* v. *Vermont*, 207 U. S. 541, 551, involved the effect of a notice to produce books and papers under a Vermont Statute, and this court said:

> "Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the State Court is final on that question."

So we say as to the decisions of the State Court on the question of when a deposition has been taken and returned in compliance with the state statute so as to admit it in evidence. If the deposition has not been taken and returned in compliance with the state statute as construed by the state decisions it is not a deposition taken "in the mode prescribed by the laws of the state in which the courts are held," and is therefore not within the terms of the Act of 1892. It is clear that the decision in this case is in conflict with the Texas decisions.

That the court erred in holding that the judgment of May 23, 1913, adjudicated, or supplied the necessary proof, that awards had been rendered against petitioner in favor of the purchasers mentioned in respondent's petition for as much as $74,820.52, or for any greater sum than $36,610.90, we believe is manifest when the verdict and judgment are read in connection with numerous decisions of this court, as well as numerous decisions of other courts of the highest authority, including Texas.

The petition in the suit, in which the judgment of May 23, 1913, was rendered, contained the following allegations:

> "That about November 1, 1901, defendant made a contract with plaintiff who was then and still is a cotton broker in Bremen, Germany, whereby defendant appointed plaintiff as its selling agent in said City of Bremen to make sales of cotton for it in said city. * * * That it was a part of said contract that all sales were to be made subject to and be governed by Bremen class and arbitration and the rules of the Bremen Cotton Exchange. That acting under said contract plaintiff made sundry sales for defendant at Bremen, Germany, of large quantities of cotton to a number of buyers, who purchased same under the rules of the Bremen Cotton Exchange, and subject to Bremen class and arbitration. That in the sales of said cotton numerous controversies arose, which were submitted to arbitration, which resulted in awards in favor of the various purchasers, aggregating 312,749.30 German Marks, equivalent to $74,334.33 American money. That by virtue of his aforesaid contract with defendant and under the rules of the Bremen Cotton Exchange plaintiff became bound and legally liable to pay at once to said purchasers the amount of said awards. That shortly after the termination of said arbitration plaintiff paid out on said awards the sum of $30,000.00, and still owes and will have to pay the further sum of $44,334.33. That by the contract between plaintiff and defendant, and by the custom and course of business betwen them, and by the rules of the Bremen Cotton Exchange defendant became liable, and promised to pay plaintiff upon the termination of said arbitrations, the said sum of $74,334.33, in order to protect and indemnify plaintiff against any loss by reason of his liability to the purchasers of the cotton" (Rec. 105-109).

Judgment was asked for the full amount, and 6% interest (Rec. 109).

In answer to that petition defendant denied that any of the arbitrations had been made or were valid, claiming fraud in each of them; and also that on August 21, 1908, defendant wrote plaintiff a letter, which contained the following provision:

> "We would like to have all sales made with the understanding that arbitration differences for grade and staple shall be those in effect (the actual differences made on C. I. F. and 6 cotton sold by us) at the time of sale, instead of the last day of landing."

And alleged that none of the arbitrations had been made upon this basis. (It will be noted that there was a large number of separate arbitrations, some of which might have been valid, and others invalid.)

Defendant also pleaded that on the 27th day of January, 1911, plaintiff and defendant entered into a written agreement for the purpose of settling the differences between them. Said agreement recited that 15,500 bales of cotton had been shipped by defendant upon sales made by plaintiff, and that at the time of said agreement—27th of January, 1911—only about 10,000 of said bales had been arbitrated, and it was agreed that the remaining 5500 bales should be arbitrated at Liverpool instead of at Bremen; and that the average amount allowed per pound on the cotton arbitrated at Liverpool should be applied to the 10,000 bales which had been arbitrated at Bremen; that no arbitration of the 5500 bales had been had at Liverpool (Rec. 110-116). (It will

thus be seen that the arbitration of the 10,000 bales might have been upheld, and the subsequent arbitration of the 5500 bales at Bremen might have been held invalid.) Copies of the letter and written contract referred to in defendant's answer in that case were attached as exhibits, and will be found commencing on page 117 of the printed record.

As applied to the case thus made, the court instructed the jury as follows:

> "This case was filed by plaintiff, Carl R. Heye, based upon the claim that he had paid out something over $76,000, or had become liable for that sum of money on account of certain findings of the Bremen Board of Arbitration of the Bremen Cotton Exchange. * * * He claims that between the dates I have indicated something over 15,000 bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and after the sales were made controversies arose as to the quality, grade and staple of the cotton, and that those controversies, under the rules of the Bremen Cotton Exchange, were submitted to the Board of Arbitrators; and the Board made its awards and that by virtue of these awards he became liable to the buyers of the cotton in about the sum of $74,333.33."

After deciding against defendant as to the effect of the letter and agreement aforesaid, the court proceeds:

> "This being so, the court is of opinion that the plaintiff in this case is entitled to recover not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with

the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of $85,000, being the total amount of money which he paid and claims to be liable for, plus the $1700.00 and some odd dollars, which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money, which he actually paid out on account of those contracts as such guarantor and security. The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the Board of Arbitration of the Bremen Cotton Exchange, and which has been in evidence to you, is $36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of $1730.16 for deficiencies in weight of the cotton, and the further sum of $36,610.96, *being the amount of the award of the Board of Arbitrators*, and I have prepared a verdict, which I now read, and which some member of your body will sign as foreman:

'We, the jury, under the direction of the court, find for the plaintiff in the sum of $1730.16 for deficiencies in weight, etc., of cotton, and the further sum of $36,610.96, being the amount paid by the plaintiff on the awards made by the Bremen Arbitrators, etc.'" (Rec. 134-135).

It is thus manifest that neither the court nor the jury made any actual finding as to any particular award, or the amount thereof, and that such a finding was not necessary to the rendition of the verdict that was rendered. All that was necessary to the rendition of such verdict

was that out of the large number of awards involved enough were legal to sustain plaintiff in the payment thereon of $36,610.96.

As applicable to this state of facts we desire to call especial attention to the leading case of *Russel* v. *Place*, 94 U. S. 606, 24 L. Ed. 214, where we find this language:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.
>
> "Thus, in the case of *Steam Packet Co.* v. *Sickles*, reported in the 24th Howard, 333 (65 U. S. XVI, 650), a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count upon a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common

counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

"When the same case was before this court the second time, *Packet Co.* v. *Sickles*, 5 Wall. 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this, that to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

We most earnestly insist that the test of *res adjudicata* as applied in that case is wholly lacking in this, namely, "that to render the judgment conclusive it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding the matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." Certainly it cannot be contended that the rendition of a verdict for $36,610.96 necessarily requires a finding that valid awards to the amount of $74,333.33 had been made. Much less was it necessary to find that the particular awards alleged in plaintiff's petition in this case

had been rendered. Bear in mind that there was nothing in the pleading in the former case which identified any of the awards involved in that case as the same as those alleged in plaintiff's petition in this.

We also call the attention of the court to the case of *Landon* v. *Clark*, 221 Fed. 841, in which the authorities are considered at length, and the case of *Russell* v. *Place*, quoted with approval as applying the proper test.

In the case of *In re William S. Butler & Co.*, 207 Fed. 705, the Circuit Court of Appeals of the First Circuit, applying the principles announced in the case of *Russell* v. *Place*, to an issue of insolvency under the bankrupt act, says:

> "With regard to the first act of bankruptcy alleged in the petition (that on the 7th day of November, 1912, receivers were put in charge of the debtor's property because of insolvency), the only evidence in its support presented at the trial was the bill, answer and decree in the equity proceedings; and the question is presented whether the decree and record in that proceeding disclose that the receivers were put in charge of the debtor's property because of insolvency (that is, because its assets at a fair valuation were not sufficient in amount to pay its debts), for unless it can be clearly determined from the decree, or record as a whole, that this was the sole, or one of the substantial grounds on which the decree appointing the receivers was based, the adjudication in bankruptcy to the extent that its validity depends upon this alleged act of bankruptcy cannot be sustained.
>
> "In *Russell* v. *Place*, the court in considering the effect of a judgment when pleaded as a bar or offered as evidence in a subsequent suit between the

same parties or their privies and for a different cause of action said (here follows a quotation of the language copied above by us from that case).

And again on page 610 of 94 U. S. the same court says:

'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.'

"See also on this question *Bactty* v. *Anderson Oil Milling Company*, 150 Fed. 293; *Cromwell* v. *County of Sac.*, 94 U. S. 351; *In re Watts*, 190 U. S. 1; *Metcalf* v. *Gilmore*, 63 N. H. 174."

In *Smith* v. *Mosier*, 169 Fed. 430, 446, it is said.

"A prior judgment is not binding or conclusive in a subsequent action as to matters of fact or questions of law which were immaterial, even if put in issue, tried and decided in such prior action. Their determination must have been pertinent and necessary to the determination of the real issue in such prior action. *House* v. *Lockwood*, 137 N. W. 259; *Stannard* v. *Hubbell*, 123 N. W. 520; *Rudd* v. *Cornell*, 171 N. W. 128. * * * It was incumbent on the defendants here in setting up the prior judgment as a bar to this action to allege and prove that the particular point or question as to which they claimed the estoppel was necessarily in issue, and necessarily decided in such prior action, and was necessarily involved and decided in determining the real issue in such prior action. *Russell* v. *Place*, 94 U. S. 606; *Soderbera* v. *Armstrong*, 116 Fed. 711; 23 Cyc. 1536, 1537, and numerous cases therein cited."

The rule in Texas is stated with precision in the case of *McAnally* v. *Haynie*, 42 S. W. 1049, 1051, and in the cases therein cited as follows:

> "To constitute a final judgment or decree, the written entries in the minutes of the court must show that the court has adjudicated and determined the rights of the parties; and, if it be a decree in equity, it must also command or direct what shall or shall not be done in order to carry out and effectuate the court's decision. *Stafford* v. *King*, 30 Tex. 269; *Fitzgerald* v. *Evans*, 53 Tex. 462; *Eastham* v. *Sallis*, 60 Tex. 576; *Barnett* v. *Caruth*, 22 Tex. 173; *Spiva* v. *Williams*, 20 Tex. 443; 1 Black, Judgm. sec. 3. In order to render available a plea of former judgment, the judgment pleaded must be complete in itself. In other words, it must show that all the issues have been decided, and in whose favor and against whom it was rendered. The subject matter of the litigation, and the rights that are determined, must be described with such precision as makes them certain and free from doubt."

It will thus be seen that all of the authorities agree that a judgment is *res adjudicata* in a second suit only as to matters that were directly presented and decided in the first, and is not *res adjudicata* as to matters which might have been decided, but were not in fact passed upon, no matter how conclusive the evidence may have been. It will, of course, be conceded that no decision was rendered in the first suit as to whether the awards alleged to have been made in favor of Diden & Haac, or in favor of Schmiyz and Roessingh, or in favor of Gebruder, Fritze & Co., or in favor of any of the other numerous individuals and firms set forth in the exhibit in plaintiff's petition were in fact made, or were made in a way to render them valid, and we think it must certainly be conceded that all that was decided in the first suit was that enough valid awards were made to authorize the

payment by plaintiff of $36,610.96. There certainly was no decision as to any particular awards, or that any awards over the $36,610.96 were made. It is true the court in that part of his charge commencing on page 178 of the record, treats the depositions of plaintiff and Oscar Polletin as supplying the necessary evidence to show the first judgment to be *res adjudicata*, but we respectfully submit that the court did not observe the distinction, so clearly drawn in all the authorities, between what was in fact decided, and what the jury might have decided under the evidence, but did not decide. The most that can be said of the depositions referred to is that, had the question been submitted to the jury, they would have been justified in finding that the awards claimed by plaintiff to have been made were the same in both suits, but that is not the question here. The question here is were valid awards made for the amounts, and in favor of the particular individuals, set forth in the exhibit to the petition? And to prove this necessary fact plaintiff relies entirely upon the verdict and judgment in the first suit, and our contention is that they do not adjudicate or establish that awards exceeding in amount $36,610.96 were ever rendered. To sustain his petition in this case it was incumbent upon plaintiff to prove that valid awards were made in favor of the particular persons and amounts alleged by him, and we confidently insist that that burden has not been discharged. He might have made the proof by original evidence, if it existed, without reference to the judgment in the first suit, but this, he made no attempt to do, and the question is did that judgment furnish the necessary evidence?

By the assignment that the court erred in holding that the claims of the several parties in whose favor the alleged awards were made were not barred by limitation when the payments were made by Respondent, these questions are presented:

(1) To what extent is the court bound by the testimony of experts as to the laws of foreign countries?

No question was raised as to the qualifications of Professor Butte as an expert. He stated that the limitation period applicable to the facts of this case in Germany was prescribed by statute, paragraph 477 of which reads:

> "The claim of the buyer for rescission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is out-lawed insofar as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from delivery of the goods; in the case of real estate in one year from the transfer of possession." (Rec. 145-6).

On cross examination he said this statute applies where there has been an arbitration or classification under the rules of the Bremen Cotton Exchange, which was only a means of providing evidence as to the quality of the cotton, and the amount of the damage, and did not change the time within which suit was required to be commenced. That such proceeding was not a statutory arbitration, which is by a court appointed in conformity with the statute, a finding which was in effect a judgment. (Rec. 147-8.) The court, however, found against this evidence, and, in effect, held there was no law of limitation applicable to the facts of this case.

(2) Conceding that the court is not bound by the opinions of expert witnesses on questions of this kind, the next question is did the court correctly construe the German statute? We respectfully submit that Professor Butte's construction of the statute, and not that of the court, is correct. We have never heard it contended that in this country the period of limitation applicable to suits upon contracts which provide for referring disputed questions of the kind here involved to architects or the like, is different from that applicable to suits upon contracts that do not so provide.

(3) If it be held that the claims of the parties in whose favor the original awards were rendered were barred both as to the principal (Petitioner) and the surety (Respondent) when Respondent made the payment, was the Circuit Court of Appeals correct in holding that Respondent was not required to take advantage of the statute, but could make the payments and compel Petitioner to reimburse him?

We understand this holding to be in conflict with the decided weight of the authorities upon this question.

In *Faires* v. *Cockrell*, 88 Texas, 428, it is said where the claim is not barred as to the surety but is barred as to the principal:

> "If, at the time the payment is made, the surety making the payment is himself legally bound to pay the debt, he may recover from the principal debtor or co-surety, although at the time the payment was made by him the principal or co-surety was discharged from the debt by limitation," citing the fol-

lowing authorities: *Peaslee V. Breed*, 10 N. H. 489; *Boardman* v. *Paige*, 11 N. H. 431; *Crosby* v. *Wyatt*, 23 Me. 136; and other cases.

But that is the rule where the surety himself is not discharged, but in this case, under the laws of Germany not only was the debt barred as to the defendant, but it was also barred as to plaintiff under the statute of that country. 23 Cyc. 259, states the rule:

"If the surety pays after the debt is barred both as to him and to his principal he cannot recover."

In *Willis* v. *Tyer*, 186 S. W. 862, it was held by the Court of Civil Appeals of Texas at El Paso:

> "The general rule is that that which releases the principal from his obligation releases the surety also. *Gourley* v. *Tyler & Simpson*, 15 S. W. 731. The sureties are not bound where the principal establishes a defense in bar. *Thompson* v. *Chaffee*, 89 S. W. 285."

In *Stone* v. *Campbell*, 83 Cal. 547, 8 L. R. A. 425, the California Supreme Court had before it a case where the debt was discharged by limitation against the principal but not as to the surety because the surety had been absent from the state and by reason of this the running of the statute had been suspended as to him. The court held:

> "A surety who pays the debt of his principal has an undoubted right to recover the amount paid. But such is not the case here. The liability of the principal had been extinguished by the Statute of Limitation before any payment by the surety. The absence of the plaintiff from the state had kept the

claim alive as to him, though it was extinguished as to the defendant. The plaintiff did not therefore pay the defendant's debt. He merely paid his own debt. By so doing he could not possibly acquire a right of action against the defendant."

It is held in *Glasscock* v. *Hamilton*, 62 Tex. 143, 153:

"It is true that if the payment made by the plaintiff was voluntary after he ceased to be liable, he could not claim contribution. *Skillin* v. *Merrill*, 16 Mass. 40; *Russell* v. *Failor*, 1 Ohio St. 327."

In sustaining the action of the trial court in holding that in the absence of evidence the value of German marks in Texas should be assumed to be their par value in Germany, the Honorable Circuit Court of Appeals, says:

> "One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial, the former being 23.8 cents and the latter 18½ cents. The purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value."

We respectfully submit that there is no such legal presumption, but on the contrary the burden is on the one who sues upon an obligation payable in a foreign currency

to allege, and prove as a part of his case, the value of the foreign currency in the currency of the country where the trial is being had. The Honorable Circuit Court of Appeals cites no authority in support of the principal of law announced by it, and we are aware of none, while those on the other side, with which we believe the opinion conflicts are numerous. For instance as early as the case of *Kermott* v. *Ayer*, 7 Mich. 181, Campbell J., says:

> "In this case the errors complained of are alleged to have arisen in regard to proof of the value of Canadian currency and the rate of Canadian interest. The remarks made by the judgment on the trial that 'these are such matters of historical knowledge as to be judicially known,' are not, we think, legally correct. These are provable facts, unless recognized by our own laws, and a judge's knowledge of facts will not dispense with proof. The decisions must be made upon the evidence. Had the decision in the case before us been based upon the historical knowledge referred to, we think the error would have been fatal."

Also the Supreme Court of Alabama, in the case of *Modawell* v. *Holmes*, 40 Ala. 391, 405, says:

> "The court cannot take judicial notice of the extent of the depreciation of the currency during the Civil War."

In *Feemster* v. *Ringo*, 5 T. B. Monroe (Ky.) 336, it is said:

> "Ringo brought an action against Feemster, and declared upon a writing dated the 24th day of April, 1823, wherein Feemster covenanted to pay Ringo two months after date $174.00 in Common-

> wealth Bank notes. * * * With respect to the amount for which judgment was rendered we would remark that no question is made by the assignment of errors. If, however, any question of the sort had been made we should not from anything contained in the record be able to afford relief to Feemster. In assessing damages the jury should have been governed by the value of the paper of the bank when by the contract it became payable with interest; and from the amount of damages assessed it is possible the jury may not have been guided by that rule, but we are not at liberty to take judicial notice of the value of the paper of the bank at any particular time, and could not therefore disturb the finding of the jury on the ground of their not having been governed by the value of the paper, if the question had been made by the assignment of errors, because the record contains nothing which shows what the value of the paper was at the time the writing sued on became payable."

In *Hogue* v. *Williamson*, 85, Tex. 553, the suit was upon the following note:

> "Saltillo, January 25, 1888.
>
> "On or before May 1, 1888, I promise to pay C. C. Hogue, or order, one thousand Mexican silver dollars.
>
> GEORGE S. WILLIAMSON."
>
> 1000 Mex.

The petition alleged that on May 1, 1888, Mexican dollars were each worth 85c in American coin, and plaintiff asks judgment for $850.00. Upon the trial in the court below the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth 85c each. The plaintiff then

rested and the defendant introduced no testimony. * * * The court, after deciding that the note was a negotiable instrument, concludes as follows:

> "We conclude that the note sued upon in this case was a negotiable, promissory note, and that when the plaintiff offered it in evidence and proved the value of the Mexican dollar at the time of its maturity he had made a *prima facia* case, and our opinion will be certified accordingly."

In 2 Wharton on Evidence, 3 Ed. Sec. 335, it is said:

> "Thus a court will take notice of the public coin and currency, though not of a foreign currency; of the existence of confederate currency and its large depreciation during the Civil War; but not of the exact fluctuation of any particular kind of currency."

In 13 Encyc. of Evidence, 425, it is said:

> "Coin & Currency—A. Domestic. Judicial notice will be taken of the value of denominational coin of the United States, and also of national currency notes. When government currency is below par, the fact is judicially noticed, but it is otherwise as to the extent of the depreciation at any particular time.
>
> "B. Foreign Coin Currency and Bonds. Judicial notice has been taken of the value of the English pound, but the value of foreign currency will not be so noticed, nor will the solvency of a foreign government which has issued bonds."

In 23 Cyc., under the title "Judgments," page 791 and 792, the rule is stated:

> "By reason of the legal tender act and of the statutes in various states, the general rule now is

> that if an action is brought on a note, bond, or other contract expressly made payable in a specific medium of payment, a judgment thereon in favor of plaintiff should also be expressed in that medium, as in gold coin, or in current money, *except* that where the contract contemplates payment in the currency of a foreign country, or in the notes of a particular bank, or anything else except current money of the United States, the value of the foreign money should be fixed by evidence, the exchange calculated, and the judgment given in American dollars and cents."

Whether the proper time for estimating the value of the German marks was the time of the trial, or the date on which Heye made the payments, is not material on the question with which we are here concerned. Concede that the proper date was the day Heye made the payments, and we still have no evidence as to the value on that date, so that the sole question is the purely legal one on whom rests the burden of proof in a suit upon an obligation payable in a foreign currency.

Respectfully submitted,

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

THE BIRGE-FORBES COMPANY, PLAINTIFF IN ERROR,

VS.

CARL R. HEYE, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

To the Honorable Supreme Court of the United States:

STATEMENT OF THE CASE.

I.

Plaintiff in error is a citizen of the State of Texas, and defendant in error is an alien, being a citizen of the German Empire, and jurisdiction in the trial court attached solely by reason of the diverse citizenship of the parties, and the judgment of the Honorable Circuit Court of Appeals is therefore final.

II.

This is an action at law by defendant in error against plaintiff in error, to recover upon about 150 awards alleged to have been rendered under the rules of the Bremen Cotton Exchange, in Bremen, Germany, against plaintiff in error, for difference in the quality of cotton sold by defendant in error, as agent of plaintiff in error, to the various persons and firms in whose favor said awards are alleged to have been made. Defendant in error claims to have paid these awards as surety, or guarantor, of plaintiff in error. The alleged awards were each for small amounts (Rec. 9-15), but defendant in error claims amounted in the aggregate to 312,749.30 German marks, equivalent to $74,820.52 American money (Rec. 4). A former suit was filed by defendant in error to recover of plaintiff in error the full amount of 312,749.30 German marks, or $74,820.52, their equivalent, which defendant in error claims was based upon these same awards, and a verdict and judgment was, on the 23rd day of May, 1913, rendered in that suit as follows:

> "On this 19th day of May, 1913, this cause came on to be heard, and both parties appeared and announced ready for trial. Then came a jury of twelve lawful men, viz., H. H. Chestnutt and eleven others, who were duly empaneled and sworn to try the cause. After hearing the evidence and the arguments of counsel as to the law of the case, the court on the 23d day of May, 1913, directed a verdict and thereupon the jury delivered in open court the following verdict, to-wit:

'We, the jury, under directions of the court, find for the plaintiff in the sum of seventeen hundred and thirty and 16/100 dollars for deficiencies in weight, etc., of cotton, and the further sum of thirty-six thousand, six hundred and ten and 96/100 dollars, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest per annum on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars. Sherman, Texas, May 23d, 1913, H. H. Chestnutt, Foreman.'

It is therefore, considered and adjudged by the court, in pursuance of said verdict, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, the Birges-Forbes Company, a private corporation, the sum of forty-three thousand eighty-two and 64/100 (43,082.64) dollars with interest thereon from this date at the rate of six per cent per annum, said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid and as to which a cause of action in his favor against the defendant has already accrued. It is further considered and adjudged by the court that plaintiff recover of defendant all costs of this suit and that he have his execution for the enforcement of this judgment" (Original Record, 135-6).

That judgment, and the depositions of defendant in error and Oscar Polletin, which were admitted over the objection of plaintiff in error, was all the evidence introduced in the trial court to establish defendant in error's allegation that the particular awards sued upon in this case had been rendered, or the aggregate amount thereof.

The depositions referred to only go to the extent of identifying the awards sued upon in this case as being the same that were involved in the suit in which the judgment copied above was rendered, and do not attempt independently to prove the rendition of said awards or the amount thereof. In the absence of said depositions there would be nothing in the record to connect the awards involved in this case with those involved in the case in which the judgment was rendered.

Plaintiff in error filed preliminary motion to quash both depositions upon the ground that they were attempted to be taken in a foreign country, under the Act of 1892, without authority, also upon the ground that they were not returned in compliance with the requirements of the State Statute; and the additional objection to the deposition of Heye was made that there is no authority for taking the deposition of a party to the suit previous to the trial for use in a Federal Court (Rec. 42). The Circuit Court of Appeals in effect decided that under the Texas decisions the depositions would have to be excluded on account of the manner they were returned, but that a failure to return depositions taken under the Act of 1892, in the manner required by the State Statute, is not ground for excluding the depositions in a Federal Court, unless injury is shown to have resulted to the complaining party from the manner they were actually returned (Rec. 136). In other words, that the decisions of the State Courts construing the State Statute and the effect of not complying with it are not controlling upon the Federal Court. That court did

not, in its opinion, express its views upon whether the depositions of witnesses in a foreign country can be taken without first obtaining authority from the court under Article 1477, nor upon whether the Acts of Congress authorize the taking of the deposition of a party to the suit in advance of the trial, but the effect of the decision is to hold against plaintiff in error on both questions.

Defendant in error's petition in the trial court shows that the alleged awards were, in terms, in German marks, and no evidence was introduced to prove the value of German marks in American money, either at the time of the trial or at the time of the alleged payments by defendant, and especially was no evidence introduced to prove such value in Texas at either of said times. The Circuit Court of Appeals holds that in the absence of evidence to the contrary, the value was properly assumed to be the nominal, or par value. In other words, that foreign currency, in the absence of evidence to the contrary, will be presumed to be the same in Texas that it is in the country that issued it, thereby taking the burden from a plaintiff who sues upon an obligation payable in the currency of a foreign country, and placing it upon the defendant (Rec. 135-6).

In its answer plaintiff in error, in addition to its general denial, and allegations of fraud in procuring each of the awards which were rendered against it, alleged that when defendant in error paid the several awards, the claims of the several parties thereon were

barred by the German Statute of Limitations, as to both plaintiff and defendant in error, and that such payments by defendant in error were voluntary, for which he cannot hold plaintiff in error liable (Rec. 28), and plaintiff in error introduced the evidence of an expert in German law who testified that such was the effect of the German Statute (Rec. 91-97), and also introduced the statute itself (Rec. 92). The Circuit Court of Appeals holds that that statute does not apply where the claims are established by the awards of arbitrators, and also that even if the claims were barred defendant was not required to rely upon the statute, but had the right to pay the claims and hold plaintiff for reimbursement (Rec. 135).

Preliminary to proceeding with the case in the Circuit Court of Appeals, plaintiff in error filed a motion calling the attention of the court to the fact that since the trial in the court below, defendant in error had become an alien enemy, engaged in active hostilities against the Government of the United States, and asking that proceedings be stayed until the termination of the war. The court declined to do this, but ordered the money to be paid to the clerk of the trial court, and by him turned over to the custodian of the property of alien enemies (Rec. 136-7).

The question for decision, and the reasons relied upon to sustain plaintiff in error's contentions will, therefore, be stated in logical order, but not in the order of their importance, in general terms, as follows:

(a)

What is the proper practice in the Circuit Court of Appeals in a case where the defendant in error has become an alien enemy pending the appeal? Should the court suspend the proceedings until the termination of the war, or should it proceed with the hearing, and in case the judgment is affirmed stay the mandate until the Supreme Court acts upon an application for a writ of error, or certiorari, and upon the refusal of these return the mandate to the District Court, with direction to enter judgment on the supersedeas bond and issue execution and collect the money, as in ordinary cases?

(b)

Did the court err in holding that the deposition of the plaintiff, Heye, and his witness, Oscar Polletin, were properly admitted in evidence?

This involves the following subsidiary questions:

(1) Do the Acts of Congress authorize the taking of the depositions of parties to the suit in advance of the trial?

(2) Does the Act of 1892 authorize the taking of *de bene esse* depositions of witnesses in a foreign country, without obtaining authority from the court under Article 1477, or is the Act of 1892 restricted to the *mode* of taking the depositions after the necessary authority has been obtained?

(3) Did the court err in holding that departure from the requirements of the State Statute in reference to taking and returning *de bene esse* depositions does not

necessitate their exclusion unless injury is shown to have resulted to the complaining party?

(4) Are the Federal Courts bound by the decisions of the State Court with reference to the construction of the State Statute, and the effect of non-compliance therewith, where the deposition in the Federal Court has been attempted to be taken under the Act of 1892?

(c)

Even if it be held that the depositions of defendant in error and his witness, Polletin, were properly admitted, did the court err in holding that the judgment of May 23, 1913, adjudicated that plaintiff was indebted to defendant upon the awards sued upon, in the sum of 312,749.30 German marks, or its equivalent, $74,333-.33, or in any sum other than $36,610.96, for which said judgment was rendered?

(d)

Did the court err in holding that the claims which defendant alleges he paid as surety for plaintiff, were not barred by the German law of limitations?

(e)

Did the court err in holding that, in the absence of evidence to the contrary, the value of German marks in Texas in American money should be assumed to be the same as their normal or par value in Germany, and that the burden was on the defendant to rebut this presumption by evidence?

SPECIFICATION OF THE ERRORS RELIED UPON.

I.

The Circuit Court of Appeals erred in not sustaining plaintiff in error's motion to abate this suit and postpone the consideration thereof until the termination of the present war between the United States and the German Empire, which motion was in this language:

> "Now comes the Birge-Forbes Company, plaintiff in error herein, and respectfully shows to the court that since the granting of the writ of error herein the defendant in error, Carl R. Heye, has become an alien enemy of the United States of America; that the said Heye, as appears from his own testimony and pleading herein, was at the institution of this suit a citizen and resident subject of the German Empire, and has so remained ever since; and that at the time the writ of error herein was perfected and the judgment upon which the same is based was rendered he was a soldier in active service in the German army, and has so remained to this time. So that when the United States declared war upon the German Kaiser and the German Empire the said Heye became and has since remained an enemy of the United States of America and of each citizen therein; and has thereby rendered himself incapable of prosecuting or maintaining a suit in the courts of this country against this plaintiff in error or any other citizen of the said United States of America.
>
> Wherefore, this plaintiff in error moves the court to abate and dismiss this suit, or at least to

suspend same until peace is restored between the United State of America and the German Empire, and to make such other orders as may seem just and right to the court" (Rec. 123-124).

The Honorable Circuit Court of Appeals in acting upon this motion or plea says:

> "Since the trial of this case the plaintiff has become an alien enemy. Upon the authority of the case of *Owens* v. *Hanney*, 9 Cranch, 180, and *Plettenberg* v. *Kalmon*, 241 Fed. 605, we hold that it is not necessary that the disposition of this appeal be held in abeyance. We will, however, under the terms of the act known as the 'Trading with the Enemy Act,' of October 6th, 1917, direct that the judgment be modified to require that the amount of the judgment be paid to the clerk of the trial court, to be by him turned over to the Alien Property Custodian" (Rec. 136-137).

II.

The court erred in that part of the charge to the jury which instructs them that the judgment of May 23, 1913, adjudicated the validity of any of the awards involved in this suit (Rec. 115).

The exact language of the part of the charge complained of, is as follows:

> "So, you will observe from the statements made that these motions for instructed verdicts raise two vital issues. The first is as to whether the former judgment rendered in May, 1913, adjudicated the question of liability so far as the claims here sued on are concerned.
>
> "The plaintiff has offered in evidence the pleadings, the charge of the court, the verdict of the

jury, and the judgment that was rendered upon that verdict in this court on the 23rd day of May, 1913. These pleadings have been read, and it could serve no useful purpose to make a second incorporation of them in the record by reading them again, and I will therefore content myself with only alluding to them in a general way.

"These pleadings exhibit the fact that there was a former suit between these same parties growing out of the transactions that occurred between them beginning early in 1901 and running into 1911, and that that portion of the transactions which occurred between them with which this former suit concerned itself were those transactions between the parties occurring between Oct., 1910, and the 1st of May, 1911. It was alleged in the petition of the plaintiff in the suit which culminated in the judgment of the 23rd of May, 1913, that the defendant company had by a contract and agreement between itself and the plaintiff constituted the plaintiff its selling agent in Bremen, Germany, to sell for it certain shipments of cotton. It was alleged that during the period in which the contract existed between the parties some 15,000 bales of cotton were shipped by the defendant company to the plaintiff, Carl R. Heye, at Bremen, Germany, to be sold by him as the agent of defendant. It was alleged that these sales were by the agreement of the parties to be made according to certain regulations existing on the Cotton Exchange in Bremen, and that among other features of those regulations it was provided that if there should be reclamations made by the German buyers from Carl R. Heye as the selling agent of the defendant company which grew out of any differences in the quality, grade and staple of the cotton sold by Carl R. Heye for the defendant company, that the ascertainment of the existence of such differences, as well as the ascertainment of the amount of money which such differences repre-

sented, was to be submitted to the Board of Arbitration of the Bremen Cotton Exchange. It was also alleged that growing out of these transactions from some time in Oct., 1910, to the 1st of May, 1911, the German buyers of the cotton shipped by the defendant company to the plaintiff, Heye, for sale by him as their agent, did make reclamations which amounted to $74,334.33, or 312,749.31 German marks, the latter amount being equivalent in German money to the former amount of American money. It was alleged that under the contract between these parties if either side should become dissatisfied with the finding of the Bremen Board of Arbitration of the Cotton Exchange at that place, that such party so dissatisfied should have the right of appeal to what is denominated as the Appeal Board, which Appeal Board has the power to pass upon the fairness and regularity of the arbitration made by the first Board which I have mentioned as the Arbitration Board of the Bremen Cotton Exchange. It is alleged in the original suit in 1913 that an appeal was taken from the Arbitration Board which found that the buyers of the cotton in Germany which the defendant had shipped and sold through the plaintiff, Carl R. Heye, should be awarded 312,749.31 German marks as the amount to which they are entitled upon the failure of the cotton shipped by the defendant to reach the classifications, grade and staple which the contract provided should characterize it. It is alleged that the finding of that Board of Arbitration was appealed from and the Appeal Board affirmed the fairness and justice of the award of the Board of Arbitration. And the plaintiff thereupon alleges that under the contract and the sales made according to the regulations prevailing upon the Cotton Exchange in Bremen, he was entitled to recover back from the defendant the value of the money that he had paid to the buyers of the cotton in Germany who had made the reclamations.

"Now the defendant resisted that contention of the plaintiff in the suit of May, 1913. The defendant denied that the cotton was to be sold according to the circumstances which I have just detailed, and the defendant further asserted that the arbitrations were unfair and unjust and that the awards were excessive and exorbitant and not expressive of the true condition of the contract as made; that the cotton was what it was represented to be and that therefore they were not liable to the plaintiff. They further alleged that there were certain circumstances which were to be understood and certain things which were to be performed by the plaintiff as their agent in order to fairly present their side of the issue to the Board of Arbitration of the Bremen Cotton Exchange and the Board of Appeal, and that plaintiff failed to perform those things which the contract required of him, and which, if he had performed, would have shown in the particulars provided for in the rules of the Bremen Cotton Exchange that the cotton shipped by the defendant did come up to the contract under which it was shipped with regard to staple and character of fineness in every way, and, that plaintiff having failed to do his duty as the contract provided, and therefore having caused loss to the defendant, he ought not to be permitted to recover.

"It was further contended if there was an agreement that the cotton should be sold according to the rules prevailing on the Bremen Cotton Exchange, and even if the arbitrations were as provided for in the rules, that subsequent to the finding of the Bremen Board, and the affirmance of it by the Appeal Board, the plaintiff, Carl R. Heye, and the defendant company entered into a new agreement to arbitrate by which under certain provisions in that agreement the arbitration was to occur in Liverpool, England, and that therefore the plaintiff was not entitled to recover in the suit of May, 1913, for

the reason that this arbitration was the one on which he must base his claim rather than the arbitration made by the Bremen Board according to the rules of the Bremen Cotton Exchange. That suit went to trial with those issues involved. It appeared at the trial according to the allegations in the pleadings in that suit, as well as in the allegations in the pleadings here and the proof introduced on that trial, that the amount of $74,334.33 claimed by the plaintiff had not been paid. That he had only paid a portion of the amount and that he brought his suit upon the idea that he was obligated to pay the balance of the $74,334.33, and when that fact appeared in the trial the court directed the jury to find for the plaintiff in that first suit only the amount he had actually paid, and thereby in effect determined that in that suit, not having paid the balance of the amount, he would be entitled to recover only the amount he had paid. In other words, under the view of the case as taken by the court there, the plaintiff's right to recover the balance for which he sues at this time was practically an inchoate right and that the amount was not due according to the terms of the contract, and therefore plaintiff was not in a condition then, although he might have subsequently acquired the right to recover by having paid the balance of the money, to have his claim matured into a judgment. The court thereupon directed a verdict for the amount that judgment showed, which was the whole amount claimed by the plaintiff in that suit, less what the evidence and pleadings showed the plaintiff, Heye, at that time had not paid to the holders of the reclamation claims.

"Now the plaintiff, Heye, has brought this second suit which the pleadings show is to recover the amount found by the Board of Arbitration of the Bremen Cotton Exchange in his favor, less what is recovered by him against the defendant com-

pany in the suit of May 23rd, 1913. So that, the proposition to be decided here is whether the effect of the former judgment is conclusive against the defendant company as to the legality of the claims now sued on and the liability of the defendant company to pay them to the plaintiff. Upon the showing in this suit by the plaintiff that subsequent to the rendition of that judgment he had paid in money to the reclamation holders the entire amount of the reclamation claims not paid at the time the former suit went to judgment, the question now is whether or not as before stated the former judgment is conclusive as to the right of the plaintiff to recover in this suit. Both parties have presented to me decisions of the highest court in the land upholding the contentions they have made, and my investigation of the authorities, has convinced me that there is no difference between these gentlemen as far as the law is concerned. This case is like many cases that are presented in the court room where the lawyers do not differ as to the law, but the differences become as wide as the two poles as to the application of the law. That seems to be the situation here. Neither side disputes the fact that the law produced by their respective adversaries is the law if it can apply to the facts of this case. I have examined the two decisions in the 94th volume of the U. S. Supreme Court Reports to which my attention was called in the argument, and I find that in Cyc. the same propositions covered by those two decisions are stated very succinctly and clearly and I believe by referring to them I can make my view of the law more understandable than by reading excerpts from the two cases in 94 U. S. I have on my desk the 23rd volume of Cyc. which contains a very exhaustive article on the subject of judgments with a citation of authorities sustaining the text supplied by the writer of the article. At page 1215, I find this language:

'A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and can not be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action.'

"The next subdivision draws the distinction between the conclusiveness of a judgment and a bar created by the former recovery and uses this language:

'A former judgment between the same parties is a bar to the maintenance of the second action only when the causes of action in the two suits are identical. But it will be conclusive and final as to any issue litigated and determined in the former suit, and coming in question in the second suit, although the latter is brought upon an entirely different cause of action.'

"Now I do not want to let pass out of my mind a proposition I think I am confronted with and that is to decide whether the liability of the defendant company to the plaintiff was adjudicated by the judgment of May 23rd, 1913, insofar as the finding of the Board of Arbitration of the Bremen Cotton Exchange is concerned. That is, whether that judgment, which was duly appealed from and affirmed by the Circuit Court of Appeals, determined the question as between these parties of the liability of the defendant company to the plaintiff for the amounts for which reclamation claims were made by the German buyers; in other words, whether the liability of the defendant company to the plaintiff was ascertained and decided by the finding of the Bremen Board with respect to the cotton shipped during the season of 1910-1911, beginning some

time in Oct., 1910, and ending May 1st, 1911, and whether the former judgment found that to be conclusive. As stated, the former case involved clearly under the pleadings whether the finding of the Bremen Board of Arbitration of the Cotton Exchange was a binding finding as between the reclamation holders of claims and Carl R. Heye for which under the terms of the contract the defendant company was liable to the plaintiff. That issue was litigated the plaintiff asserting in that case which matured into the judgment of May 23rd, 1913, that the finding of the Bremen Board was an arbitration by agreement which established the fact that the claims were valid and the amount which should be paid, the defendant company contending that the finding was invalid because unfairly made, and because the findings were excessive and exorbitant and because the plaintiff in those litigations before that Board had not fairly represented the defendant company, and because subsequent to the finding of the Board they had agreed upon a new arbitration. All these issues were presented in the original suit and determined adversely to the defendant company here.

"I call attention to one other passage on the subject which I have been discussing which appears on page 1298 of Cyc., I find this language:

'Identity of the subject matters is not the true test to determine whether a judgment in one action is conclusive in another, although some of the cases have stated this as a general rule. It is undoubtedly true that a judgment is evidence in a second action between the same parties or their privies concerning the same subject matter as to all questions litigated and decided; that a former judgment can not operate as a bar to a second suit unless it concerns the same subject matter and is upon the same cause of action, and that the estoppel of a judgment, whatever may be its extent as between the parties, is con-

fined, as to their privies, to the particular subject of the litigation. But still it is a well settled rule that the judgment of a court of competent jurisdiction on a question directly involved in the suit is conclusive in a second suit between the same parties, where the same question comes again in issue, although the second action relates to a different subject matter. Thus the former judgment will be an estoppel where the same question or issue, depending on the same transaction or state of facts, arises also in the second suit, although in relation to different rights or different property, but not where the question in the second suit, although similar to that in the first, grows out of a different transaction or state of facts, nor where the second action, although relating to the same subject matter, is between different parties, or grows out of the same subject matter, but involves a different question or claim in regard to it.'

"Furthermore:

'The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not. Or as the rule is otherwise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first.'

"Then skipping a paragraph, I find this rule given:

'The general rule is that a judgment is conclusive for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action.'

"Now I think the distinction made by the text there is clear and can be easily ascertained as to how it should be applied to this case. There is no doubt but that in the first case which went to judgment on the 23rd of May, 1913, the plaintiff here, who was the plaintiff there, sought to recover from the defendant for the very claims which he seeks to recover now and that the result of the trial which failed to give him the recovery he seeks in this suit was occasioned because of the fact that he had not paid at that time the claims now sued on and which were presented in that trial, and which have subsequent to that judgment been paid. So that the vital issue was decided in the first trial—that is, that the defendant was liable to the plaintiff under the contract between them for all reclamation claims found by the Board of Arbitration of the Bremen Cotton Exchange for cotton sold by plaintiff as agent of defendant, that is, the finding of the Bremen Board established the validity of the claims.. But I held in the former trial that Heye could not recover from the defendant company then simply because he was liable to pay the reclamation claim holders; that his right to recover must be limited to the amount he had actually paid to the claim holders, and that was why the judgment was rendered for the sum it was and not for the full amount sued for.

"Now, in this case, I think the pleadings and evidence establish the fact that this a suit to recover on the part of the same plaintiff from the

same defendant company the amount of reclamation claims Heye had not paid when the first suit went to judgment and which he has since paid. That can be very plainly established in my mind from an inspection of the testimony in the record and that portion of it upon which there is no dispute. Certain interrogatories were propounded to the plaintiff by his counsel and among them was interrogatory 2nd, which reads as follows:

'Referring to the arbitration allowance made against the Birge-Forbes Company in favor of certain European buyers on account of cotton sold them at Bremen through you as selling agent during the cotton season of 1910-1911, and referring to the first suit brought by you against the Birge-Forbes Company based upon said claims, which suit went to judgment in this court on May 23rd, 1913, please state whether or not you ever paid to the European purchasers the remaining sums due them that you had not actually paid at the time of the trial of said first suit?'

"This interrogatory very plainly asked him whether since the judgment of May 23rd, 1913, he had completed the payment of the claims held by the reclamation claim holders growing out of the failure of the cotton shipped to come up to quality, grade and staple to what it was represented to be. His answer is as follows:

'In answer to interrogatory II the witness says: I state that I paid to the European purchasers of the Birge-Forbes Company's shipments during the cotton season of 1910-1911, all remaining sums still due them when judgment was given in my favor for the first part of this suit on May 23rd, 1913.'

"The answer to the next interrogatory sets out the parties to whom payments were made.

"The deposition of the witness, Oscar Polletin, discloses the fact that he held what was called a power of attorney from the plaintiff, Carl R. Heye.

The scope of his power does not appear in the evidence. I think it must have been something like General Manager of the business of Heye. He sets out exhibits from the books of the plaintiff, Carl Heye, which show that those payments were made and that they were made first by giving Heye's notes to the holders of the claims and afterwards the notes were taken up by the payment of cash by Carl R. Heye to those holders, and that this was done on the 6th of May, 1914. So that I feel like under the state of the law as the court conceives it to be applied to the evidence in this case that the liability of the defendant company on the claims sued for here was adjudicated in the former judgment between these same parties in this court which judgment was rendered on the 23rd day of May, 1913" (Rec. 105-111).

III.

The court erred in that part of the charge which was given to the jury to the effect that the judgment of May 23rd, 1913, adjudicated that the awards in that suit amounted to Seventy-four Thousand, Three Hundred, Thirty-four and 33/100 Dollars ($74,334.33) (Rec. 115).

The exact language of the part of the charge complained of is copied under assignment II above.

IV.

The court erred in that part of the charge given the jury to the effect that the judgment rendered on May 23rd, 1913, adjudicated that the awards that were in controversy in that suit amounted to more than Thirty-

six Thousand, Six Hundred, Ten and 96/100 Dollars ($36,610.96) (Rec. 115).

The exact language of the part of the charge complained of is set forth in assignment No. II above.

V.

The court erred in refusing defendant's requested instruction, which is as follows:

> "The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of any of the buyers of cotton sold by plaintiff as the agent of the defendant, as alleged in plaintiff's petition, and you will therefore find in favor of the defendant" (Rec. 115-116).

The requested charge was in the assignment (Rec. 102).

VI.

The court erred in refusing defendant's requested instruction, which is as follows:

> "The evidence in this case is not sufficient to authorize you to find that any awards were rendered in favor of the buyers of cotton sold by plaintiff as the agent of defendant beyond the sum of $36,-610.96, for which plaintiff recovered judgment on the 23rd of May, 1913, and which judgment is admitted in his pleading to have been paid by defendant, and you will therefore return your verdict in favor of the defendant" (Rec. 116).

The requested charge was in the language of the assignment (Rec. 103).

VII.

The court erred in refusing defendant's requested instruction, which is as follows:

> "The judgment of May 23rd, 1913, in evidence before you was and is an adjudication that defendant was only liable to the plaintiff upon the claims or awards set forth in the petition in that case in the amount for which said judgment was rendered, and you will therefore find in favor of the defendant" (Rec. 116).

The requested charge was in the language of the assignment (Rec. 103).

VIII.

The court erred in that part of the charge given to the jury to the effect that the claims involved in this case were not barred by the laws of limitation in force in Germany (Rec. 116).

The part of the charge complained of is in the following language:

> "That leaves another question in the case which is the question of limitation. That is as to whether under the laws that prevailed in the German Empire this claim of the plaintiff, Carl R. Heye, can be enforced against the defendant company here. Or, to state the matter a little more literally, the question is whether when Heye paid to the German buyers their reclamation claims those claims as to Heye were barred, or as to the defendant company were barred by the statutes of limitation that prevailed in the German Empire. In other words, it is the contention of the defendant that when Heye made the payments to the reclamation claim holders,

he was under no legal obligation to do so, however great his moral obligation may have been, and that the payments were made voluntarily and therefore created no obligation on the defendant company to reimburse him. My attention has been called on this proposition to some sections of a book, which has been admitted to be correct, translating certain parts of the prescription or limitation laws of Germany. In order that the book may be identified, I will state in this connection that it calls itself 'The German Civil Code' and purports to have been translated and annotated by a Mr. Wang. My attention has been called to Section 477 of this German Civil Code, which reads as follows:

'The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defect, in the case of movables in six months after delivery; in the case of land in one year after the transfer. The period of prescription may be extended by contract.'

"Now, in my opinion, if this suit had been brought without any of the circumstances which surrounded the transaction between the parties, Section 477 of the German Civil Code would have barred the holders of the reclamation claims from obtaining anything on account of the failure of the cotton purchases by them to come up to the contract representations as to quality, grade and staple. I think it is manifest that the enactment of this statute was intended to permit a speedy adjustment of those claims where there was a failure of an article sold by one person to another in Germany to come up to the promised quality of the article so sold; that is, while the matter is fresh in their minds and while the controversy is new, if it is then decided, it will be more apt to be a proper and just ascertainment than if delayed. Therefore I am con-

vinced under ordinary circumstances that if these reclamation claim holders had undertaken to establish their claims more than six months after the delivery of the cotton, section 477 would have defeated a recovery if applied. That is not the situation here. These people had in advance some idea that there would be differences in judgment as to whether the cotton sold would come up to the cotton contracted for in quality, grade and staple, and they entered into an agreement which, as far as I am able to say, they had a right to enter into committing the decision of that matter to the Board of Arbitration of the Bremen Cotton Exchange. They both signed it and agreed to it, and for a long period of years all their transactions were regulated by it. It seems that no controversy arose between them until the end of the cotton season of 1910-1911. If prior to the controversy in this suit a dispute had arisen between them this record fails to disclose it. Then this controversy came up in which the findings of the Board of Arbitration of the Bremen Cotton Exchange were objected to. An appeal was taken from the finding of that Board and the finding of the Board was affirmed. So that, when the Board of Arbitration of the Bremen Cotton Exchange found that the cotton sold by the Birge-Forbes Company to the German buyers through their agent, Carl R. Heye, failed to correspond in quality, grade and staple to the cotton bought by these buyers, and found that a certain amount of money should be paid by Heye, acting in the sale as the agent of the defendant company and those findings of the Board were affirmed by the Board of Appeals, then it was no longer, in the judgment of the court, a claim for compensation on account of the absence of promised quality in the thing sold, but became like any other claim, an ascertained and determined demand, fixed in its amount and absolute in its obligation. And therefore the court is of the opinion

that under these circumstances the six months statute does not apply and the court is of the further opinion that the claim of the plaintiff is not barred by any statute of limitation, and that plaintiff has a right to recover, and it is my duty to direct a verdict in favor of the plaintiff" (Rec. 111-113).

IX.

The court ered in refusing defendant's requested instruction, which is as follows:

> "The undisputed evidence in this case shows that whatever cause of action the buyers of the cotton may have had against defendant under the allegations contained in his (plaintiff's) petition became and was barred by limitation under the laws of Germany before the dates he alleges he made the payments, for which recovery is sought, and you will therefore find in favor of the defendant" (Rec. 116).

The requested instruction is in the language of the assignment (Rec. 103).

X.

The court erred in instructing a verdict for the plaintiff for forty-one thousand, five hundred thirty-six and 79/100 dollars ($41,563.79), under the pleadings and facts in this case (Rec. 116).

The part of the charge complained of was in this language:

> "I find, therefore, that the plaintiff is entitled to recover from the defendant company the amount of money paid by him on May 6, 1914, which amount in German money was 159,715.97 German

marks, and the court finds that the American equivalent of that in American money at the time of the payment, to-wit: May 6, 1914, was $37,533.25. Now, the plaintiff is entitled to interest on that amount from the date of the payment until the rendition of this judgment. The time for which interest should be estimated, according to my recollection, is two years and eight months and the rate per cent at which interest could be calculated is 4%. I therefore calculate the interest at 4% for two years and eight months, which interest, according to my calculation, amounts to $4,003.54, being a total of principal and interest to the date of this trial on this day of $41,563.79. Under the view of the law which the court takes, and the evidence adduced on the trial, I direct the jury to return a verdict for plaintiff for $41,563.79" (Rec. 113).

XI.

The court erred in overruling defendant's motion to quash and suppress the deposition of Oscar Polletin taken in this case (Rec. 117).

The motion referred to was in this language:

"Now comes the defendant and moves the court to suppress the depositions of Carl R. Heye and Oscar Polletin filed herein on the 30th day of December, 1916, for the following reasons, to-wit:

"First. It appears that the depositions *de bene esse* were taken in a foreign country, to-wit: Germany, and there is no authority in law for the taking of such depositions outside of the United States of America.

"Second. If said depositions were taken under the Act of 1892, they were not sent to the court by mail; there is no receipt or indorsement by the Post Master at the point where mailed acknowledging

that he received it from the hands of the officer taking the depositions and signed by him as required by the commission, nor of the officer who took the depositions that he delivered it to the Post Master. If sent by private conveyance, it was not delivered to the court by the carrier in person as required by the commission.

"Third. It appears that the said Carl R. Heye is plaintiff. There is no authority in law for the taking of the deposition of the plaintiff" (Rec. 43).

The court after hearing and considering the motion to quash the depositions of Carl R. Heye and Oscar Polletin, overruled said motion in the following language:

"In passing upon the question I must decide upon the proper effect to be given to the waiver and agreement signed by counsel for defendant in this case when the attempt was being made to take the depositions of the witnesses, Carl R. Heye and Oscar Polletin. I have not thought it necessary after investigation to base the ruling upon the construction to be given the statutes which have been read, but perhaps it may assist in throwing light upon the line of reasoning by which I reach the conclusion if I refer briefly to those statutes. My attention has been called to Section 861, which reads as follows:

'The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court except as hereinafter provided.'

"Now, I think the other statutes which have been read practically show that there are only two, possibly three, modes by which this rule laid down in Section 861, can be departed from in the taking of evidence to be used in court. Section 861 an-

nouncing practically the common law rule on the subject, those exceptions to it must be strictly construed. One of them is what is known as depositions *de bene esse*. There is no pretense that that mode was followed, because nothing connected with the procedure from its inception to its close shows any effort to follow article 863, which provided for the taking of depositions *de bene esse*. Subsequent sections of the statutes define the occasions and provide the modes in which evidence may be presented in the trial of actions at common law in the courts of the United States. One of them is Section 866, known as the dedimus statute, and appears to have been passed for the purpose of enabling the court to authorize the taking of depositions in any case where the procurement of justice seemed to demand the taking of them. The article is in this language:

'In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus protestatum to take depositions according to common usage.'

"That is an enlargement of the power of the court where the circumstances did not exist to authorize the taking of depositions according to Section 863, by providing for other cases in which depositions may be taken.

"It is contended here that this deposition was not taken under Article 866, known as the Dedimus Statute, because no application was made to the court. I think that is true. I hold that the deposition was not taken under that statute, because it required an application to the court, and in this case, no application was made.

"The other section called to my attention, is the Act of March 9, 1892, which provides that in addition to the mode of taking of depositions of witnesses in cases pending at law or in equity in the District or Circuit Courts of the United States, it

is lawful to take depositions of witnesses in the mode provided by the laws of the state in which the courts are held. There seems to have been an effort to pursue the method provided in the Act of March, 1892, in taking these depositions, and here as a matter of fact is what happened: The plaintiff in this case propounded the interrogatories to the witnesses. The defendant company by its attorneys propounded cross interrogatories to those witnesses, and upon those direct and cross interrogatories the depositions were taken, which depositions are now sought to be quashed. Plaintiff's attorneys at the conclusion of the interrogatories prepared an agreement which I am going to read:

'Time, notice, copy and issuance of commission are hereby waived, and it is agreed that any qualified officer may proceed to take and return the depositions of the witness on the original, direct and cross interrogatories with the effect as if a commission had regularly issued.'

"That was the language as originally prepared. Now, it appears beyond controversy that that was submitted to attorneys for defendant and they struck out the following words and added the following words: In line one they eliminated the words 'and issuance of commission,' and in line two they erased the words 'any qualified,' in line four they erased the words 'in like effect as if a,' and then following the word 'commission' in line five they struck out the words 'had regularly issued.' They added the word 'but' in line four, and added after the word 'commission' the words 'is not waived,' so that as changed the language was as follows:

'Time, notice and copy are hereby waived, and it is agreed that officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived.'

"To the interrogatories to the witness, Oscar Polletin, this is the language finally signed by counsel for defendant:

'Time, notice and copy are hereby waived and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories.'

"The writing which in itself is scant, contains a waiver, and an agreement as well. I think I must consider it in the light of what happened at the time the agreement was made. Here was an effort by plaintiff's counsel to take the depositions of the witnesses, Heye and Polletin, in answer to the interrogatories then and there tendered to counsel for defendant. It must have been in the minds of all the parties that the purpose was to have Heye appear and answer these interrogatories, and such cross interrogatories as defendant's counsel might file. Defendant's counsel did file their cross interrogatories, after signing the agreement I have read. I must give that agreement its common sense construction, and that is that the proper officer might have these witnesses appear before him and answer the interrogatories and swear to them, and the officer transmit the answers to the court here, for that was evidently the purpose of counsel when they signed the agreement and when the interrogatories and cross interrogatories were prepared. Time, notice and copy were waived; in fact everything was waived except the issuance of commission, and then follows the agreement which says that it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories. That was an agreement that they might take the answers and return the answers on those direct and cross interrogatories. The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be

taken and used in court in this trial as evidence. The parties had the power as well as the right to make this agreement and have it upheld by the court. They had the right to agree to an absolute final judgment in this case, and, of course, could agree to anything in the procedure leading up to the judgment.

"That presents for decision before me the proposition as to whether the method in which the depositions were returned was fair and free from suspicion. It was a substantial compliance with the state statute on the subject of the return of depositions, and seems to have been an effort to comply with it.

"An inspection of the envelope in which these depositions were returned shows that the case was properly styled, and that the officer who took the depositions made this certificate:

'I, Dr. jur Robert Voigt, the officer before whom the within depositions were taken, do hereby certify that I, in person, deposit this package with the officer of the Consulate of the United States of America, Bremen, Germany, for transmission on this day.

Bremen, November 13th, 1916.

Signed with the signature of the officer and seal.'

"Following that is this certificate:

'Received this package on the 13th day of November, 1916, from the hands of Dr. jur Robt. Voigt, the officer before whom the depositions were taken, and forwarded same the 25th day of November, in the official mail pouch to the Department of State, Washington, D. C. for further transmission to the addressee.

WILLIAM THOMAS FEE,
Consul of the United States of America, Bremen, Germany.'

"I have before me as a part of the record this envelope which bears the words 'Department of State, U. S. A.' and shows by endorsement on it that it came by registered mail and that it was directed to the clerk of United States District Court, Sherman, Texas. I can only infer that the envelope containing the depositions, with the certificates I have read, reached here in the white envelope which bears the evidences of having been sent here by the Department of State of the United States of America. I have before me the clerk's certificate endorsed on the envelope containing the depositions that he received the same from the Post Office at Sherman on the 30th day of December, 1916, and that it was opened at the request of the attorneys for defendant. I hold that under the circumstances which I am bound to consider in connection with the taking and returning of these depositions, and the conditions which prevail in reference to the method by which mail and intelligence can be transmitted under the conditions produced by the great war, the method of taking and returning the depositions was a substantial compliance with the law, and a sufficient compliance in the light of the agreement made; that the manner of taking and returning the depositions is free from suspicion of unfairness, and I therefore overrule the motion to quash" (Rec. 67-70).

XII.

The court erred in overruling defendant's motion to quash and suppress the deposition of plaintiff, Carl R. Heye, taken in this case (Rec. 117).

The motion and language of the court referred to is set forth in assignment XI above.

XIII.

The court erred in admitting in evidence the deposition of plaintiff, Carl R. Heye (Rec. 117).

The objection to this deposition, and the action of the court thereon, is in the following language:

> "Plaintiff introduced in evidence the deposition of Carl R. Heye, which is hereinbefore fully set out at length.
>
> "When this deposition was offered to be read the defendant objected to the same as a whole on the ground that it showed that the witness is a party plaintiff and his deposition *de bene esse* would not be admissible in evidence; and, second, that it is shown that the deposition was taken in a foreign country and was not taken in compliance with the law which authorizes the taking of depositions in a foreign country; third, because it appears that the deposition was not returned in the manner required by the Act of 1892 under which it appears to have been attempted to be taken as shown by defendant's motion to quash. The court overruled the objections and in so doing stated that he based his action upon the reasons given in his opinion in ruling on the motion to quash. To this action of the court the defendant then and there in open court excepted, and still excepts, and in this behalf tenders its bill of exception" (Rec. 87).

BRIEF OF THE ARGUMENT.

Alien Enemy.

With reference to the practice which should be observed by appellate courts in cases where one of the parties becomes an alien enemy pending the appeal, we believe no better statement of the principles underlying the decisions can be made than is found in the case of *Hanger* v. *Abbot,* 6 Wallace, 532, wherein it is said:

> "We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during the war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chit. C. & M. 423. During the war, says Sir William Scott, there is a total inability to sustain any contract by an appeal to the tribunal of the one country on the part of the subjects of the other. The Hoop, 1. c. Rob. 200; *Al Cinous* v. *Nigrew,* 4 El. L. & Bl. 217. The views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subpects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. He says in effect that the power of confiscating such debts theoretically exists, though it is seldom, or never, practically exerted; that the right of the creditors to sue for the recovery of the debt is not extinguished; that it is only suspended during the war,

> and it revives in full force on the restoration of peace. The suspension of the remedy during the war is so absolute that courts of justice will not even grant a commission to take testimony in an enemy's country; but when the reason for the suspension ceases the right to prosecute revives, and the fact that the right had been suspended constitutes no disability."

Numerous authorities are cited to each of the propositions announced in the opinion.

A very able discussion of the questions here involved will be found in the case of *Bishop* v. *Jones & Petty*, 28 Tex. 294, 316, where it is said:

> "The right of prosecuting suits by citizens of one friendly power in the courts of another is a well established rule of international comity. This, however, is and in the very nature of things can only be a rule of peace. War terminates all friendly intercourse between the citizens of hostile states. There cannot be, as has been frequently said, 'a war for arms and a peace for commerce.' To suffer individuals to carry on commercial or friendly intercourse while the two governments are at war would be placing the act of the government and the acts of individuals in contradiction with each other. Certainly such antagonism of the citizen to his government cannot receive the sanction or encouragement of its courts, much less will they become instrumental in giving aid and protection to its enemies. It is therefore not to be disputed as a general rule that the resident citizens of one belligerent cannot bring or prosecute a suit in the courts of the other. There are, however, certain exceptions to this general rule as well established as the rule itself.

> As we have seen, the general rule depends upon and grows out of the fundamental principle that when the sovereign power of the state declares war against another state it implies that the whole nation declares war, and that all the subjects or citizens of the one are enemies to those of the other, and all intercourse and transactions with those who are enemies of the state is illegal and should be condemned, because it contravenes the object and policy of the government, embarrasses the operation of war and lessens the ability and efficiency of the government in its prosecution."

In conclusion it was held that the effect of the war was only to suspend the prosecution of the suit, and as peace had been declared before the court was called upon to decide the appeal, the error of the court below would not require a reversal as the only effect would be to send the case to the trial court to render the same judgment which had been appealed from.

In the case of *Plettenberg, Holthaus & Co.* v. *I. J. Kalmos & Co.*, 241 Fed. 605, Speer, District Judge, had occasion to consider the questions here involved in a suit which was commenced before the declaration of war by the United States against Germany, but which he was not called upon to decide until after such declaration. After considering the authorities at some length, including the case of *Owens* v. *Hanney*, 9 Cranch. 189, he says:

> "My conclusion therefore is that the action should not be dismissed but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

A full discussion of this question, in which authorities by the hundred are cited, will be found in the Co-Operator for June, 1917, in which the conclusion is in accordance with the views above expressed. In that article it is also said:

> "According to an early case in the United States Supreme Court (*Owens* v. *Hanney*, 9 Cranch, 180), it would seem that if war breaks out during the pendency of a writ of error the plaintiff in error cannot take advantage of the fact that the original plaintiff is an alien enemy, but the judgment may be affirmed. But a recent English case (*Porter* v. *Freudenburg*, 1 K. B. 857; *Canadian, Stewart Co.* v. *Terik*, 25 Q. B. R. 158; *Actien-Gossellschaft Fur. Anilin-Frabikation* v. *Levinstein*, 31 Times L. R. 225) holds that an alien enemy, who is plaintiff in an action commenced before the outbreak of the war, has no right of appeal, such right being suspended until the conclusion of peace."

In Corpus Juris, 117, it is said:

> "That plaintiff has become an alien enemy since the commencement of the action does not abate the action, but merely suspends it during the continuance of hostilities, and on removal of the disability it revives in full force."

However, in the case of *Howes* v. *Chester*, 33 Ga. 89, it is held that under the circumstances indicated above the action should be dismissed; and in the article in the Co-Operator referred to above, it is said:

> "In some jurisdictions it has been held that where an action has been commenced before the war the proceeding is only suspended, whereas a suit brought after the commencement of the war will be dismissed, even though if dismissed the statutory

period of limitation may possibly run, and so put an end to the action.

In other cases it is held that where the plaintiffs become alien enemies subsequent to the institution of the suit the action should be dismissed, rather than continued on the docket, but the dismissal should be without prejudice. The court will refuse to dissolve an injunction against the enforcement of a judgment where since the injunction has been obtained the judgment creditors have become alien enemies."

Numerous authorities are cited by the author.

The case of *Owens* v. *Hanney*, 9 Cranch, referred to above, has sometimes been cited as sustaining the contention that the fact that the plaintiff has become an alien enemy does not prevent the prosecution of a writ of error to final judgment, and even does not prevent the collection of the judgment and the transmission of the proceeds of such enemy. That such contention is entirely inconsistent with all the authorities, unless it be the case referred to, is manifest, and it is believed that that case does not support the construction given it. It is true that in that case the point was made, but the entire opinion consists only of five lines, as follows:

"Marshall, Ch. J., states the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point,"

which is the point with which we are concerned.

Notwithstanding Judge Speer, in the case in 241 Fed. referred to above, considered the case of *Owens* v.

Hanney, he did not regard it as controlling the disposition which should be made of the case before him, nor did the Supreme Court of the United States, in the case referred to above in 6 Wallace, even allude to that case.

We regard the question of general importance outside of its bearing upon the instant case.

Depositions of Heye and Polletin.

By the assignments which call in question the action of the court in admitting the depositions of Heye and Polletin, several important questions are presented:

First: Do the acts of Congress authorize the taking of the deposition of a party to a case at law in the Federal Court in advance of the trial?

Art. 1464 of the Compiled Statutes, being the Act of 1906, reads:

> "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

That Act repealed, or superseded, the Act of 1864, which provided that no witness should be excluded on account of his color or because of his being a party to the suit.

The Texas statute reads:

> "Art. 3688. No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue tried."

Art. 1472 of the Compiled Statutes of the United States provides for the taking of *de bene esse* depositions in the limits of the United States but it has been many times decided that this Article does not authorize the taking of such depositions in foreign countries, and that authority for taking depositions in foreign countries must be obtained from the court under Article 1477, which reads:

> "In any case when it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus protestatum* to take depositions according to common usage."

A commission under this section is not granted as a matter of course, but is confided to the judicial discretion of the court, who takes into consideration the importance of the evidence, the inconvenience and expense of procuring the deposition and all other circumstances. *U. S.* v. *Parratt*, Fed. Cas. No. 15,999. No attempt was made to procure the deposition under this article, sole reliance being placed upon the Act of 1892, which reads:

> Compiled Code, Art. 1476. "In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the District and Circuit Courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held."

As to whether these statutes authorize the taking of depositions of parties to the suit before the trial, or are confined to ordinary witnesses, there is much difference

of opinion. District Judge Finkelnberg, of the Eastern District of Missouri, in *Blood* v. *Morrin*, 140 Fed. 918, holds that the depositions of parties who reside over 100 miles from the place of trial, since the Act making them competent witnesses, can be taken under the same circumstances as the depositions of ordinary witnesses. On the other hand, the intimations are very strong in *Hanks Dental Association* v. *International Tooth Crown Co.*, 194 U. S. 303; *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250, and *Ex Parte Fiske*, 113 U. S. 724, that the testimony of parties to suits cannot be taken in advance of the trial, and that their testimony is governed by Compiled Code, Art. 1468, which reads: "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided," and Judge Lacombe, in *Frost* v. *Barber*, 173 Fed. 847, holds that the federal practice does not permit the examination of a party before the trial. His language is:

> "The federal practice does not permit examination of a party before trial. *Hanks Dental Association* v. *International Tooth Crown Co.*, 194 U. S. 303. The object of Section 863, Rev. St. is not to enable a party to ascertain, in advance of the trial, what will be the testimony of some particular witness, but solely to secure him against going to trial without the testimony of every witness whom he believes he should call or examine."

The effect of the decision in the instant case in holding the deposition of plaintiff, Heye, to have been properly admitted is with Judge Finkelnberg, although the

question is not discussed. The extent to which opinions differ upon this question is well illustrated by the following quotation from Simpkins' A Federal Equity Suit, 3rd Edition, 506 *et seq.*:

> *"When State Permits Depositions in Advance of the Issues.*
>
> By the act of March 9, 1892, it was provided by Congress that the practice in the State Courts in issuing depositions may be pursued in the Federal courts. In many of the States depositions may be taken at any stage of the case, but the provisions of these statutes authorizing depositions in advance of the issues do not apply to the Federal courts. The act of 1892 has been frequently construed, and with few exceptions it has been held that State statutes are only to be followed in the manner of taking, and do not apply to the grounds for taking depositions. *United States* v. 50 *Boxes & Packages of Lace*, 92 Fed. 601; *Hanks Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 309, 48 L. Ed. 991, 24 Sup. Ct. Rep. 700, reviewing cases; *Zych* v. *American Car & Foundry Co.*, 127 Fed. 953; *National Cash Register Co.* v. *Leland*, 37 C. C. A. 372; 94 Fed. 502; *Pullman Co.* v. *Jordan*, 134 C. C. A. 301, 218 Fed. 574. Congress, it is held, did not enlarge the conditions under which they may be taken for use in the Federal courts. *Ibid.*; *Ex parte Fiske*, 113 U. S. 713-725, 28 L. Ed. 1117-1121, 5 Sup. Ct. Rep. 724; *Shellabarger* v. *Oliver*, 64 Fed. 307, 308; *Despaux* v. *Pennsylvania R. Co.*, 81 Fed. 897; *Magone* v. *Colorado Smelting & Min. Co.*, 135 Fed. 846. In *Ex parte Fiske*, the Supreme Court held that section 914 of the United States Revised Statutes (Comp. Stat. 1913, sec. 1537), conforming the practice of the Federal courts on the common-law side to the practice of the State courts, did not include an author-

ity to take the depositions of a defendant under oath before trial; that to do so was in conflict with U. S. Rev. Stat. Sec. 861 (Comp. Stat. 1913, Sec. 1468). *Ibid.*; *United States* v. 50 *Boxes & Packages of Lace*, 92 Fed. 601; *National Cash Register Co.* v. *Leland*, 94 Fed. 502; *Hanks Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 306, 48 L. Ed. 990, 24 Sup. Ct. Rep. 700. This was a construction of a New York law permitting an examination of a party as a witness in advance of the trial. This case was followed in construing the act of 1892, with the result as above stated, and it may be stated that the Texas statute (from 2273 to 2293), insofar as it permits depositions in advance of the issues to be taken does not apply in trials in Federal courts, and this whether the suit be in law or equity. *Shellabarger* v. *Oliver*, 64 Fed. 307, 308; *National Cash Register Co.* v. *Leland*, 77 Fed. 242.

In the light of these decisions, then, depositions in advance of the issues joined cannot be taken in the Federal courts unless coming within the provisions of equity rule 47 and the statutes of the United States, Sections 863, 866 and 867, as these acts were not in any way added to or modified by the act of 1892. Congress would have so stated in apt words if so intended, is the language of the decisions. *Blood* v. *Morrin*, 140 Fed. 919.

The Federal courts have never permitted a party to use depositions for the purpose of fishing for information, or to force a party to disclose his case by pumping him, or his witnesses out of time. *Ibid. Flower* v. *MacGinniss*, 50 C. C. A. 291, 112 Fed. 377; *Despeaux* v. *Pennsylvania R. Co.*, 81 Fed. 897; *National Cash Register Co.* v. *Leland*, 77 Fed. 242; *Hanks Dental Asso.* v. *International Tooth Crown Co.*, 194 U. S. 306, 48 L. Ed. 990, 24 Sup. Ct. Rep. 700. A contrary view has been strenuously insisted upon by Judge Lacombe of the

second circuit in construing the Act of 1892 (*International Tooth Crown Co.* v. *Hanks Dental Asso.*, 101 Fed. 306; *International Tooth Crown Co.* v. *Carter*, 112 Fed. 396), and by Judge Hanford in *Smith* v. *Northern P. R. Co.*, 110 Fed. 342, but the rule as stated has been decided in the fifth circuit. *Texas & P. R. Co.* v. *Wilder*, 35 C. C. A. 105, 92 Fed. 958; *United Lace & Braid Mfg. Co.* v. *Barthels Mfg. Co.*, 213 Fed. 536. See *Curtis* v. *Phelps*, 209 Fed. 263."

But conceding that Judge Finkelnberg's decision is correct in its application to witnesses who reside in the United States, the question still remains whether it is correct as applied to parties and witnesses who reside in foreign counties. We have seen that in the absence of the Act of 1892, authority to take the deposition of a witness in a foreign country must be obtained from the court, who in granting or withholding the permission will take into consideration the importance of the evidence, the inconvenience and expense, and the other circumstances, and the question is does the Act of 1892 make the right to take such depositions a matter of absolute right, or is it restricted to the mode or manner of taking the deposition after authority to take it has been secured from the court?

We respectfully submit that the important questions of practice here involved should be set at rest by an authoritative decision by this court.

But even if it be held that our position on what has heretofore been said with reference to the depositions of defendant in error and Polletin is not sound, the exceed-

ingly important question as to what is the effect, in the Federal courts, of a failure to take and return depositions attempted to be taken under the Act of 1892 in compliance with the statutory requirements of the state in which the court is being held, still remains. This question applies both to the deposition of plaintiff, Heye, and that of his witness, Oscar Polletin. This involves also a consideration of the question to what extent the Federal courts should be governed by the decisions of the State Court upon the effect of a failure to comply with particular provisions of the state statute. It will be observed that the Act of 1892 only admits a deposition, even when taken in this country, when it has been taken "in the mode prescribed by the laws of the state in which the courts are held," and the first question is how is a Federal Court to determine when the state law has been complied with? Both the trial court and the Circuit Court of Appeals in this case seemingly hold that when the deposition is not returned in compliance with the statutory requirements the burden is on the complaining party to show that he has suffered injury from the manner in which they were returned. In other words, that the court has the power to substitute for the statutory requirements another *mode* which it thinks "is just as good." That this is in conflict with the view announced by the Circuit Court of Appeals in *Pullman Co.* v. *Jordan*, 218 Fed. 573, seems clear. In that case it is said:

> "The plaintiff below in the proceedings adopted, for securing the testimony of Dr. John

A. Lenfestey, elected, as under the statute he had the right to do, to follow the mode prescribed by the laws of Alabama, the state in which the court was held. Having so elected, it was incumbent upon him to proceed in conformity with the requirements of the state law as to the mode of procuring the depositions. Compiled Statutes 1913, Sec. 1537."

We do not understand that there is any claim that the depositions in question were returned in compliance with the state statutes. The Circuit Court of Appeals in its opinion, says:

"The depositions of the witnesses Polletin and Heye were apparently taken under the Texas statute. These depositions were not returned directly by the officer taking them, nor directly by anyone to whom he entrusted them. They were taken in Germany and were transmitted to the United States in the only way that was practicable, that is, by giving them to an American Consul, and having them transmitted to the Department of State, and then to the clerk of the court through the mail. This was not in absolute accordance with the procedure prescribed by the Texas Statute; and it may be, under the strict rules which have been announced in that state, the depositions would have been suppressed. There could be no substantial reason for suppressing these depositions, based upon the fact that they went primarily to an officer of the United States, and then to the State Department, before being entrusted to the mails. No effort is made to attack the integrity of the deposition. The officer who took the depositions certified to them, and enclosed, sealed and addressed them as required by the Texas Statute. When they were forwarded Germany was at war. If they had been sent by mail in the ordinary way they would have been

exposed to hazards to which packages sent in the manner adopted were not exposed. They would have been liable to seizure and search, involving the opening of the envelopes containing them. The result would have been to make it questionable whether what came to the hands of the clerk was the depositions as they were when deposited in the mail in Germany. The failure strictly to conform to the statutory method of forwarding the depositions involved no injury to the plaintiff in error. The judgment under review is not to be reversed because of a ruling which was not harmful."

The section of the Texas Statute applicable reads:

"Art. 3660. (2284) (2229) Execution of the commission. Upon the appearance of the witness, the officer to whom the commission is directed shall proceed to take his answers to the interrogatories. The answers shall be reduced to writing, and shall be signed and sworn to by the witness. The officer shall certify that the answers of the witness were signed and sworn to by the witness before him, and shall seal them up in an envelope, together with the commission and interrogatories and cross interrogatories, if any, and shall write his name across the seal, and indorse on the envelope the names of the parties to the suit and of the witnesses, and shall direct the package to the clerk of the court from which the commission issued; and, if the depositions be sent by mail, the officer taking the same shall certify on the envelope enclosing the depositions that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited for transmission."

The depositions were not sent by mail direct to the clerk as required by this statute, but were returned through the consular service (Rec. 65-66).

The officer who took the depositions did not "certify on the envelope enclosing the depositions that he in person deposits the same in the mail for transmission, stating the date when and the post office in which the same are deposited," but on the contrary did certify on the envelope that he "deposited this package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission" (Rec. 66). The plan thus adopted by the German notary may have been just as good, or even better, than the plan adopted by the Texas Legislature, and the United States Congress, but it was not the same, and the plan which the next German notary adopts, if it is left for them to choose, may not be the same as the one adopted by this one, or even as good as the Texas law, but if the decision in this case prevails the depositions will still be admitted unless the complaining party is able to show they have been tampered with. That this is not in accord with the Texas decisions, must be conceded, and is conceded by the opinion rendered by the Circuit Court of Appeals copied above.

In *Garner* v. *Cutler*, 28 Texas, 175, it is said:

> "The taking of testimony by depositions is a departure from the common-law rules of evidence. It has, therefore, always been held, that the statutory rules permitting the same, must be fully and fairly, if not strictly, complied with, and if this be not done, such testimony unquestionably should be excluded.
>
> "The statute prescribes, that the party desiring to take the deposition of a witness, whose testi-

mony may be presented in this manner, shall give notice to the opposite party of the name and residence of the witness whose testimony he proposes to take. This requirement was without doubt intended to secure valuable and important rights to the party in whose behalf it is provided. Without, however, speculating upon this, it is sufficient to say, that if the name and residence have not in fact been given, the deposition is not taken in manner and form as required by law, and should be excluded for that reason, if objection to it be properly made."

In *Laird* v. *Ivens*, 45 Tex. 621, it is said:

"The appellant, who was the defendant in the District Court, made a motion in writing, which was overruled before the trial of the cause, to suppress the depositions of Edmond M. Ivens, taken by the plaintiff, 'Because there is no certificate on the package or envelope inclosing said depositions, by the postmaster at New Orleans, Louisiana, showing from whom the said depositions were received by him.'

"It appears by the indorsement on the envelope that the depositions were taken by 'Alfred Ingram, Commissioner for the State of Texas, at New Orleans, Louisiana.' The deputy postmaster made the following indorsement on the envelope, to-wit: 'Received at New Orleans post office July 20, 1874; to be forwarded by mail. W. H. Worker, Dep. P. M.'

"The statute requires that if the depositions be sent by mail, 'the postmaster or his deputy mailing the same shall indorse thereon that he received them from the hand of the officer before whom they were taken.' This means, as we understand it, that in this case the deputy postmaster should have indorsed, that he received the package from 'Alfred Ingram, Commissioner,' because he appeared, from

the indorsement on the sealed package, to be the person who had taken the depositions, and that was likely to be the only means of his knowing who had taken them. And if the postmaster should happen to know who did take the depositions, apart from what appears on the envelope, which would not often be the case, still it would be better for him to state in his endorsement the name of the person from whom he received the package to be forwarded by mail, as that was evidently the intention of the statute, upon a reasonable construction of it, considering the manner in which such business is usually transacted (Paschal's Dig., Art. 3729.) The statute was not complied with substantially in this case.

"It has uniformly been held that there must be a strictly substantial compliance with the statute in taking depositions and in the form and manner of returning, when exceptions are taken in writing and notice thereof given before the trial. (Paschal's Dig., Art. 3741); *Garner* v. *Cutler*, 28 Tex. 181.

"We are of opinion that the court erred in overruling the motion of defendant to suppress or exclude these depositions of E. M. Ivens thus returned into court in this case."

In *Barber* v. *Greer*, 94 Tex. 581, 584, it is said:

"Art. 2284 Revised Statutes prescribe the manner of taking and returning depositions in these words:

'Upon the appearance of the witness the officer to whom the commission is directed shall proceed to take his answers to the interrogatories. The answers shall be reduced to writing and shall be signed and sworn to by the witness. The officer shall certify that the answers of the witness were signed and sworn to by the witness before him, and shall seal them up in an envelope together with the

> commission and interrogatories and cross interrogatories, if any, and shall write his name across the seal and endorse on the envelope the names of the parties to the suit, and of the witnesses, and shall direct the package to the clerk of the court, or justice of the peace from which the commission issued.' The object of this statute is to have the endorsement made upon the outer cover of the package containing the deposition so that when the clerk of the court to which the deposition is returned shall receive it, he will know in what case to file the paper, and also who is entitled to have it opened for examination. Returned in the manner the deposition was in this case, the clerk could not know that it was a deposition, nor in what case, and could not properly open it at the request of any person, because it was impossible for him to tell to what suit in that court it belonged. These requirements are strictly statutory, and must be substantially complied with."

The Act of Congress only admits depositions such as these which have been taken in the *mode* prescribed by the State Statute, and certainly the construction of that statute is for the state court. As said by Justice Brewer in *Smiley* v. *Kansas*, 196 U. S. 447, 445:

> "We accept the construction given to a state statute by that court. * * * The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

The case of *Consolidated Refining Co.* v. *Vermont*, 207 U. S. 541, 551, involved the effect of a notice to produce books and papers under a Vermont Statute, and this court said:

> "Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the State Court is final on that question."

So we say as to the decisions of the State Court on the question of when a deposition has been taken and returned in compliance with the state statute so as to admit it in evidence. If the deposition has not been taken and returned in compliance with the state statute as construed by the state decisions it is not a deposition taken "in the mode prescribed by the laws of the state in which the courts are held," and is therefore not within the terms of the Act of 1892. It is clear that the decision in this case is in conflict with the Texas decisions.

The Federal decisions cited by defendant in error are in reference to *de bene esse* depositions taken under the Federal Statute, Arts. 863—865, which, as to returning the depositions, only requires that they be by the officer taken, sealed up and directed to such court, and remain under his seal until opened in court"—Decisions under that Statute manifestly have but little application to depositions taken our Texas Statutes.

The honorable trial judge, however, largely, if not exclusively, placed his ruling upon these depositions upon the agreements which plaintiff in error had made with reference to them. In his opinion overruling the motion to quash he says:

> "I must give that agreement its common sense construction, and that is that the proper officer might have these witnesses appear before him and

answer the interrogatories and swear to them, and the officer transmit the answers to the court here, for that was evidently the purpose of counsel when they signed the agreement, and when the interrogatories and cross interrogatories were prepared. Time, notice and copy were waived. In fact everything was waived except the issuance of commission; and then follows the agreement which says that it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories. That was an agreement that they might take the answers and return the answers on these direct and cross interrogatories. The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be taken and used in court in this trial as evidence. The parties had the power as well as the right to make this agreement and have it upheld by the court. They had the right to agree to an absolute final judgment in this case, and of course could agree to anything in the procedure leading up to the judgment."

We thus have presented for decision the sole question of the proper construction of the agreements referred to. We do not question the right of the parties to agree, and plaintiff does not claim that the depositions were taken or returned in compliance with the statute unmodified by the agreement. What then was the agreement as to the deposition of the plaintiff, Heye? It was in this language:

> "Time, notice and copy are hereby waived, and it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories, but commission is not waived."

Our construction of this agreement is that it only dispensed with the requirements of the statute in the particulars named in the agreement, and that under that agreement it was necessary for an officer authorized by law to take and certify and return the depositions in compliance with the statute, but that this might be done by having the original direct and cross interrogatories attached to the commission instead of copies as required by the statute. The court, however, construed the agreement to authorize the officer to take and return the depositions in his own way, and that the only question left is for the court to decide whether it was returned under his test of fairness; and that it was not necessary to take and return the depositions under the tests of fairness prescribed by the statute. Note the court says:

> "The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be taken and used in court in this trial as evidence."

We respectfully submit that the words which the court finds were eliminated by defendant's counsel from the original agreement as prepared by plaintiff indicate a fixed unwillingness to make the broad agreement which the court finds they did make.

In overruling the motion to quash, the court, among other things, said:

> "There seems to have been an effort to pursue the method provided in the Act of March, 1892, in taking these depositions, and here as a matter of fact is what happened: The plaintiff in this case

propounded the interrogatories to the witnesses. The defendant company by its attorneys propounded cross interrogatories to those witnesses, and upon those direct and cross interrogatories the depositions were taken, which depositions are now sought to be quashed. Plaintiff's attorneys at the conclusion of the interrogatories prepared an agreement which I am going to read:

'Time, notice, copy and issuance of commission are hereby waived, and it is agreed that any qualified officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories with the effect as if a commission had regularly issued.'

"That was the language as originally prepared. Now, it appears beyond controversy that that was submitted to attorneys for defendant and they struck out the following words and added the following words: In line one they eliminated the words 'and issuance of commission,' and in line two they erased the words 'any qualified,' in line four they erased the words 'in like effect as if a,' and then following the word 'commission' in line five they struck out the words 'had regularly issued.' They added the word 'but' in line four, and added after the word 'commission' the words 'is not waived,' so that as changed the language was as follows:

'Time, notice and copy are hereby waived, and it is agreed that officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived.'

"To the interrogatories to the witness, Oscar Polletin, this is the language finally signed by counsel for defendant:

'Time, notice and copy are hereby waived, and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories.' "

If it was the intention to make the broad agreement indicated by the court, why eliminate anything from the agreement as prepared by plaintiff's counsel? Plaintiff's attorneys by presenting the interrogatories manifested their intention to adopt that course in procuring the testimony of their client and his witness, Polletin; and defendant had the right either to refuse to agree at all or to make such limited agreement as it deemed proper; and the court was without power to interpolate into the agreements entirely new provisions. It is respectfully submitted that all that is waived by the agreement is the taking of the deposition upon the original instead of copies of the interrogatories, together with a waiver of the time, notice and copy of the interrogatories, which would have been necessary had they been served upon the defendant in the usual way. Nothing was waived as to the manner of taking and returning the depositions; and to give the agreement the construction given it by the learned trial judge would absolutely preclude attorneys from making any waiver of any kind with reference to the taking of depositions, as it would subject them to the peril of having evidence used against them which had been taken and returned in the most informal and unreliable way. By the failure of the Circuit Court of Appeals to comment upon this part of the opinion of the learned trial judge, we assume they intended to have it understood that they concurred in the views here expressed with reference to this agreement; and intended to base their ruling upon the ground that the state statute was not binding upon the Federal Court.

Effect of the Judgment of May 23, 1913, as Res Adjudicata.

That the court erred in holding that the judgment of May 23, 1913, adjudicated or supplied the necessary proof that awards had been rendered against plaintiff in error in favor of the purchasers mentioned in defendant in error's petition for as much as seventy-four thousand, eight hundred twenty and 52/100 dollars ($74,820.52), or for any greater sum than thirty-six thousand, six hundred ten and 90/100 dollars ($36,610.90) we believe is manifest when the verdict and judgment are read in connection with numerous decisions of this court, as well as numerous decisions of other courts of the highest authority, including Texas.

The petition in the suit, on which the judgment of May 23, 1913, was rendered, contained the following allegations:

> "That about November 1, 1901, defendant made a contract with plaintiff who was then and still is a cotton broker in Bremen, Germany, whereby defendant appointed plaintiff as its selling agent in said City of Bremen to makes sales of cotton for it in said city. * * * That it was a part of said contract that all sales were to be made subject to and be governed by Bremen class and arbitration and the rules of the Bremen Cotton Exchange. That acting under said contract plaintiff made sundry sales for defendant at Bremen, Germany, of large quantities of cotton to a number of buyers, who purchased same under the rules of the Bremen Cotton Exchange, and subject to Bremen class and arbitration. That in the sales of said cotton numerous controversies arose, which

were submitted to arbitration, which resulted in awards in favor of the various purchasers, aggregating 312,749.30 German Marks, equivalent to $74,334.33 American money. That by virtue of his aforesaid contract with defendant and under the rules of the Bremen Cotton Exchange plaintiff became bound and legally liable to pay at once to said purchasers the amount of said awards. That shortly after the termination of said arbitration plaintiff paid out on said awards the sum of $30,000.00, and still owes and will have to pay the further sum of $44,334.33. That by the contract between plaintiff and defendant, and by the custom and course of business between them, and by the rules of the Bremen Cotton Exchange defendant became liable, and promised to pay plaintiff upon the termination of said arbitrations, the said sum of $74,334.33, in order to protect and indemnify plaintiff against any loss by reason of his liability to the purchasers of the cotton" (Rec. 70-71).

Judgment was asked for the full amount, and 6% interest (Rec. 72).

In answer to that petition defendant denied that any of the arbitrators had been made or were valid, claiming fraud in each of them; and also that on August 21, 1908, defendant wrote plaintiff a letter, which contained the following provisions:

> "We would like to have all sales made with the understanding that arbitration differences for grade and staple shall be those in effect (the actual differences made on C. I. F. and 6 cotton sold by us) at the time of sale, instead of the last day of landing."

And alleged that none of the arbitrations had been made upon this basis. (It will be noted that there was

a large number of separate arbitrations, some of which might have been valid, and others invalid.)

Defendant also pleaded that on the 27th day of January, 1911, plaintiff and defendant entered into a written agreement for the purpose of settling the differences between them. Said agreement recited that 15,500 bales of cotton had been shipped by defendant upon sales made by plaintiff, and that at the time of said agreement—27th of January, 1911—only about 10,000 of said bales had been arbitrated, and it was agreed that the remaining 5500 bales should be arbitrated at Liverpool instead of at Bremen; and that the average amount allowed per pound on the cotton arbitrated at Liverpool should be applied to the 10,000 bales which had been arbitrated at Bremen; that no arbitration of the 5500 bales had been had at Liverpool (Rec. 72-76). (It will thus be seen that the arbitration of the 10,000 bales might have been upheld, and the subsequent arbitration of the 5500 bales at Bremen might have been held invalid.) Copies of the letter and written contract referred to in defendant's answer in that case were attached as exhibits, and will be found commencing on page 76 of the printed record.

As applied to the case thus made, the court instructed the jury as follows:

> "This case was filed by plaintiff, Carl R. Heye, based upon the claim that he had paid out something over $76,000, or had become liable for that sum of money on account of certain findings of the Bremen Board of Arbitration of the Bremen Cotton Ex-

change. * * * He claims that between the dates I have indicated something over 15,000 bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and after the sales were made controversies arose as to the quality, grade and staple of the cotton, and that those controversies, under the rules of the Bremen Cotton Exchange, were submitted to the Board of Arbitrators; and the Board made its awards and that by virtue of these awards he became liable to the buyers of the cotton in about the sum of $74,333.33" (Rec. 82).

After deciding against the defendant as to the effect of the letter and agreement aforesaid, the court proceeds:

"This being so, the court is of opinion that the plaintiff in this case is entitled to recover not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of $85,000, being the total amount of money which he paid and claims to be liable for, plus the $1700.00 and some odd dollars, which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money, which he actually paid out on account of those contracts as such grantor and security. The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the Board of Arbitration of the

Bremen Cotton Exchange, and which has been in evidence to you, is $36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of $1730.16 for deficiencies in weight of the cotton, and the further sum of $36,610.96, *being the amount of the award of the Board of Arbitrators*, and I have prepared a verdict, which I now read, and which some member of your body will sign as foreman:

'We, the jury, under the direction of the court, find for the plaintiff in the sum of $1730.16 for deficiencies in weight, etc., of cotton, and the further sum of $36,610.96, being the amount paid by the plaintiff on the awards made by the Bremen Arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest on both of said sums from May 1, 1911, amounting in the total forty three thousand and eighty-two and 64/100 dollars" (Rec. 85-86).

It is thus manifest that neither the court nor the jury made any actual finding as to any particular award or the amount thereof, and that such a finding was not necessary to the rendition of the verdict that was rendered. All that was necessary to the rendition of such verdict was that out of the large number of awards involved enough were legal to sustain plaintiff in the payment thereon of $36,610.96.

As applicable to this state of facts we desire to call especial attention to the leading case of *Russell* v. *Place*, 94 U. S. 606, 24 L. Ed. 214, where we find this language:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question

directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on his head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

"Thus, in the case of *Steam Packet Co.* v. *Sickles,* reported in the 24th Howard, 333 (65 U. S. XVI, 650), a verdict and judgment for the plaintiff a prior action against the same defendant on a declaration, containing a special count upon a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

"When the same case was before this court the second time, *Packet Co.* v. *Sickles,* 5 Wall. 580, the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this, that to render the

> judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

We most earnestly insist that the test of *res adjudicata* as applied in that case is wholly lacking in this, namely, "that to render the judgment conclusive it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding the matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." Certainly it cannot be contended that the rendition of a verdict for $36,610.96 necessarily requires a finding that valid awards to the amount of $74,333.33 had been made. Much less was it necessary to find that the particular awards alleged in plaintiff's petition in this case had been rendered. Bear in mind that there was nothing in the pleading in the former case which identified any of the awards involved in that case as the same as those alleged in plaintiff's petition in this.

We also call the attention of the court to the case of *Landon* v. *Clark*, 221 Fed. 841, in which the authorities are considered at length, and the case of *Russell* v. *Place*, quoted with approval as applying the proper test.

In the case of *In re William S. Butler & Co.*, 207 Fed. 705, the Circuit Court of Appeals of the First Circuit, applying the principles announced in the case of *Russell* v. *Place*, to an issue of insolvency under the bankrupt act, says:

> "With regard to the first act of bankruptcy alleged in the petition (that on the 7th day of November, 1912, receivers were put in charge of the debtor's property because of insolvency), the only evidence in its support presented at the trial was the bill, answer and decree in the equity proceedings; and the question is presented whether the decree and record in that proceeding disclose that the receivers were put in charge of the debtor's property because of insolvency (that is, because its assets at a fair valuation were not sufficient in amount to pay its debts), for unless it can be clearly determined from the decree, or record as a whole, that this was the sole, or one of the substantial grounds on which the decree appointing the receivers was based, the adjudication in bankruptcy to the extent that its validity depends upon this alleged act of bankruptcy cannot be sustained.
>
> "In *Russell* v. *Place*, the court in considering the effect of a judgment when pleaded as a bar or offered as evidence in a subsequent suit between the same parties or their privies and for a different cause of action said (here follows a quotation of the language copied above by us from that case).
>
> And again on page 610 of 94 U. S. the same court says:
>
> 'If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.'

"See also on this question *Bactty* v. *Anderson Oil Milling Company*, 150 Fed. 293; *Cromwell* v. *County of Sac.*, 94 U. S. 351; *In re Watts*, 190 U. S. 1; *Metcalf* v. *Gilmore*, 63 N. H. 174."

In *Smith* v. *Mosier*, 169 Fed. 430, 446, it is said:

"A prior judgment is not binding or conclusive in a subsequent action as to matters of fact or questions of law which were immaterial, even if put in issue, tried and decided in such prior action. Their determination must have been pertinent and necessary to the determination of the real issue in such prior action. *House* v. *Lockwood*, 137 N. W. 259; *Stannard* v. *Hubbell*, 123 N. W. 520; *Rudd* v. *Cornell*, 171 N. W. 128. * * * It was incumbent on the defendants here in setting up the prior judgment as a bar to this action to allege and prove that the particular point or question as to which they claimed the estoppel was necessarily in issue, and necessarily decided in such prior action, and was necessarily involved and decided in determining the real issue in such prior action. *Russell* v. *Place*, 94 U. S. 606; *Soderbera* v. *Armstrong*, 116 Fed. 711; 23 Cyc. 1536, 1537, and numerous cases therein cited."

The rule in Texas is stated with precision in the case of *McAnally* v. *Haynie*, 42 S. W. 1049, 1051, and in the cases therein cited as follows:

"To constitute a final judgment or decree, the written entries in the minutes of the court must show that the court has adjudicated and determined the rights of the parties; and, if it be a decree in equity, it must also command or direct what shall or shall not be done in order to carry out and effectuate the court's decision. *Stafford* v. *King*, 30 Tex. 269; *Fitzgerald* v. *Evans*, 53 Tex. 462; *Eastham* v. *Sallis*, 60 Tex. 576; *Barnett* v. *Caruth*, 22 Tex. 173; *Spiva* v. *Williams*, 20 Tex. 443; 1 Black,

> Judgm. sec. 3. In order to render available a plea of former judgment, the judgment pleaded must be complete in itself. In other words, it must show that all the issues have been decided, and in whose favor and against whom it was rendered. The subject matter of the litigation, and the rights that are determined, must be described with such precision as makes them certain and free from doubt."

It will thus be seen that all of the authorities agree that a judgment is *res adjudicata* in a second suit only as to matters that were directly presented and decided in the first, and is not *res adjudicata* as to matters which might have been decided, but were not in fact passed upon, no matter how conclusive the evidence may have been. It will, of course, be conceded that no decision was rendered in the first suit as to whether the awards alleged to have been made in favor of Diden & Haac, or in favor of Schmyz and Roessingh, or in favor of Gebruder, Fritze & Co., or in favor of any of the other numerous individuals and firms set forth in the exhibit in plaintiff's petition were in fact made, or were made in a way to render them valid, and we think it must certainly be conceded that all that was decided in the first suit was that enough valid awards were made to require the payment by plaintiff of $36,610.96. There certainly was no decision as to any particular awards, or that any awards over the $36,610.96 were made. It is true the court in that part of his charge commencing on page 178 of the record, treats the depositions of plaintiff and Oscar Polletin as supplying the necessary evidence to show the first judgment to be *res adjudicata*, but we respectfully

submit that the court did not observe the distinction, so clearly drawn in all the authorities, between what was in fact decided, and what the jury might have decided under the evidence, but did not decide. The most that can be said of the depositions referred to is that, had the question been submitted to the jury, they would have been justified in finding that the awards claimed by plaintiff to have been made were the same in both suits, but that is not the question here. The question here is were valid awards made for the amounts, and in favor of the particular individuals, set forth in the exhibit to the petition? And to prove this necessary fact plaintiff relies entirely upon the verdict and judgment in the first suit, and our contention is that they do not adjudicate or establish that awards exceeding in amount $36,610.96 were ever rendered. To sustain his petition in this case it was incumbent upon plaintiff to prove that valid awards were made in favor of the particular persons and amounts alleged by him, and we confidently insist that that burden has not been discharged. He might have made the proof by original evidence, if it existed, without reference to the judgment in the first suit, but this, he made no attempt to do, and the question is did that judgment furnish the necessary evidence?

Plaintiff's Claim Barred by Limitation.

By the assignment that the court erred in holding that the claims of the several parties in whose favor the alleged awards were made were not barred by limitation when the payments were made by defendant in error, these questions are presented:

(1) To what extent is the court bound by the testimony of experts as to the laws of foreign countries?

No question was raised as to the qualifications of Professor Butte as an expert. He stated that the limitation period applicable to the facts of this case in Germany was prescribed by statute, paragraph 477 of which reads:

> "The claim of the buyer for rescission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is out-lawed insofar as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from delivery of the goods; in the case of real estate in one year from the transfer of possession" (Rec. 92).

On cross examination he said this statute applies where there has been an arbitration or classification under the rules of the Bremen Cotton Exchange, which was only a means of providing evidence as to the quality of the cotton, and the amount of the damage, and did not change the time within which suit was required to be commenced. That such proceeding was not a statutory arbitration, which is by a court appointed in conformity with the statute, a finding which was in effect a judgment. (Rec. 93-94). The court, however, found against this evidence, and, in effect, held there was no law of limitation applicable to the facts of this case.

(2) Conceding that the court is not bound by the opinions of expert witnesses on questions of this kind, the next question is did the court correctly construe the German statute? We respectfully submit that Professor Butt's construction of the statute, and not that of the

court, is correct. We have never heard it contended that in this country the period of limitation applicable to suits upon contracts which provide for referring disputed questions of the kind here involved to architects or the like, is different from that applicable to suits upon contracts that do not so provide.

(3) If it be held that the claims of the parties in whose favor the original awards were rendered were barred both as to the principal and the surety when defendant in error made the payment, was the Circuit Court of Appeals correct in holding that defendant in error was not required to take advantage of the statute, but could make the payments and compel plaintiff in error to reimburse him?

We understand this holding to be in conflict with the decided weight of the authorities upon this question.

In *Faires* v. *Cockrell*, 88 Texas, 428, it is said where the claim is not barred as to the surety but is barred as to the principal:

> "If, at the time the payment is made, the surety making the payment is himself legally bound to pay the debt, he may recover from the principal debtor or co-surety, although at the time the payment was made by him the principal or co-surety was discharged from the debt by limitation," citing the following authorities: *Peaslee* v. *Breed*, 10 N. H. 489; *Boardman* v. *Paige*, 11 N. H. 431; *Crosby* v. *Wyatt*, 23 Me. 136; and other cases."

But that is the rule where the surety himself is not discharged, but in this case, under the laws of Germany

not only was the debt barred as to the defendant, but it was also barred as to plaintiff under the statute of that country. 23 Cyc. 259, states the rule:

> "If the surety pays after the debt is barred both as to him and to his principal he cannot recover."

In *Willis* v. *Tyer*, 186 S. W. 862, it was held by the Court of Civil Appeals of Texas at El Paso:

> "The general rule is that that which releases the principal from his obligation releases the surety also. *Gourley* v. *Tyler & Simpson*, 15 S. W. 731. The sureties are not bound where the principal establishes a defense in bar. *Thompson* v. *Chaffee*, 89 S. W. 285."

In *Stone* v. *Campbell*, 83 Cal. 547, 8 L. R. A. 425, the California Supreme Court had before it a case where the debt was discharged by limitation against the principal but not as to the surety because the surety had been absent from the state and by reason of this the running of the statute had been suspended as to him. The court held:

> "A surety who pays the debt of his principal has an undoubted right to recover the amount paid. But such is not the case here. The liability of the principal had been extinguished by the Statute of Limitation before any payment by the surety. The absence of the plaintiff from the state had kept the claim alive as to him, though it was extinguished as to the defendant. The plaintiff did not therefore pay the defendant's debt. He merely paid his own debt. By so doing he could not possibly acquire a right of action against the defendant."

It is held in *Glasscock* v. *Hamilton*, 62 Tex. 143, 153:

> "It is true that if the payment made by the plaintiff was voluntary after he ceased to be liable, he could not claim contribution. *Skillin* v. *Merrill*, 16 Mass. 40; *Russell* v. *Failor*, 1 Ohio St. 327."

Value of German Marks in Texas.

In sustaining the action of the trial court in holding that in the absence of evidence the value of German marks in Texas should be assumed to be their par value in Germany, the Honorable Circuit Court of Appeals, says:

> "One of the assignments raises the question as to whether, in the rendition of a judgment, the German mark should be computed at its normal value, or at the value which it had at the time of the trial, the former being 23.8 cents and the latter 18½ cents. The purpose of the judgment is to make whole the plaintiff for the amount which he paid out in discharging the obligations of his principal. The evidence failing to disclose any depreciation of the German mark at the time of this payment, the assumption should be that the value of the mark was at that time the normal value, and the judgment should be predicated upon this value" (Rec. 135-136).

We respectfully submit that there is no such legal presumption, but on the contrary the burden is on the one who sues upon an obligation payable in a foreign currency to allege, and prove as a part of his case, the value of the foreign currency in the currency of the country where the trial is being had. The Honorable Circuit Court of Appeals cites no authority in support of

the principal of law announced by it, and we are aware of none, while those on the other side, with which we believe the opinion conflicts are numerous. For instance as early as the case of *Kermott* v. *Ayer*, 7 Mich. 181, Campbell J., says:

> "In this case the errors complained of are alleged to have arisen in regard to proof of the value of Canadian currency and the rate of Canadian interest. The remarks made by the judge on the trial that 'these are such matters of historical knowledge as to be judicially known, are not, we think, legally correct. These are provable facts, unless recognized by our own laws, and a judge's knowledge of facts will not dispense with proof. The decisions must be made upon the evidence. Had the decision in the case before us been based upon the historical knowledge referred to, we think the error would have been fatal."

Also the Supreme Court of Alabama, in the case of *Modawell* v. *Holmes*, 40 Ala. 391, 405, says:

> "The court cannot take judicial notice of the extent of the depreciation of the currency during the Civil War."

In *Feemster* v. *Ringo*, 5 T. B. Monroe (Ky.) 336, it is said:

> "Ringo brought an action against Feemster, and declared upon a writing dated the 24th day of April, 1823, wherein Feemster convenanted to pay Ringo two months after date $174.00 in Commonwealth Bank notes. * * * With respect to the amount for which judgment was rendered we would remark that no question is made by the assignment of errors. If, however, any question of the sort had been made we should not from anything

contained in the record be able to afford relief to Feemster. In assessing damages the jury should have been governed by the value of the paper of the bank when by the contract it became payable with interest; and from the amount of damages assessed it is possible the jury may not have been guided by that rule, but we are not at liberty to take judicial notice of the value of the paper of the bank at any particular time, and could not therefore disturb the finding of the jury on the ground of their not having been governed by the value of the paper, if the question had been made by the assignment of errors, because the record contains nothing which shows what the value of the paper was at the time the writing sued on became payable."

In *Hogue* v. *Williamson*, 85 Tex. 553, the suit was upon the following note:

"Saltillo, January 25, 1888.

"On or before May 1, 1888, I promise to pay C. C. Hogue, or order, one thousand Mexican silver dollars.

GEORGE S. WILLIAMSON."

1000 Mex.

The petition alleged that on May 1, 1888, Mexican dollars were each worth 85c in American coin, and plaintiff asks judgment for $850.00. Upon the trial in the court below the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth 85c each. The plaintiff then rested and the defendant introduced no testimony. * * * The court, after deciding that the note was a negotiable instrument, concludes as follows:

"We conclude that the note sued upon in this case was a negotiable, promissory note, and that when the plaintiff offered it in evidence and proved the value of the Mexican dollar at the time of its maturity he had made a *prima facie* case, and our opinion will be certified accordingly."

In 2 Wharton on Evidence, 3 Ed. Sec. 335, it is said:

"Thus a court will take notice of the public coin and currency, though not of a foreign currency; of the existence of confederate currency and its large depreciation during the Civil War; but not of the exact fluctuation of any particular kind of currency."

In 13 Encyc. of Evidence, 425, it is said:

"Coin & Currency—A. Domestic. Judicial notice will be taken of the value of denominational coin of the United States, and also of national currency notes. When government currency is below par, the fact is judicially noticed, but it is otherwise as to the extent of the depreciation at any particular time.

"B. Foreign Coin Currency and Bonds. —Judicial notice has been taken of the value of the English pound, but the value of foreign currency will not be so noticed, nor will the solvency of a foreign government which has issued bonds."

In 23 Cyc. under the title "Judgments," pages 791 and 792, the rule is stated:

"By reason of the legal tender act and of the statutes in various state, the general rule now is that if an action is brought on a note, bond, or other contract expressly made payable in a specific medium of payment, a judgment thereon in favor of plaintiff should also be expressed in that medium,

as in gold coin, or in current money, *except* that where the contract contemplates payment in the currency of a foreign country, or in the notes of a particular bank, or anything else except current money of the United States, the value of the foreign money should be fixed by evidence, the exchange calculated, and the judgment given in American dollars and cents."

Whether the proper time for estimating the value of the German marks was the time of the trial, or the date on which Heye made the payments, is not material on the question with which we are here concerned. Concede that the proper date was the day Heye made the payments, and we still have no evidence as to the value on that date, so that the sole question is the purely legal one on whom rests the burden of proof in a suit upon an obligation payable in a foreign currency.

We respectfully submit this case with the prayer that all further proceedings herein be finally abated or at least stayed until the termination of the existing war between the German Empire and The United States of America, and until Defendant in Error ceases to be an enemy of this country, and, that the judgment of the trial court be reversed and this cause dismissed.

Respectfully submitted,

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JAMES D. MAHER,
CLERK.

No. [redacted]76

IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, PLAINTIFF IN ERROR,

VS.

CARL R. HEYE, DEFENDANT IN ERROR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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Attorneys for Plaintiff in Error.

HENRY O. HEAD,
Of Counsel.

No. 400.

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Supreme Court of the United States

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VS.

CARL R. HEYE, DEFENDANT IN ERROR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PLAINTIFF IN ERROR.

It is our wish to file a short reply brief in answer to brief of defendant in error. We shall not attempt to make this reply comprehensive, as we have already expressed our views in our original brief; but we desire to point out in a somewhat general way some of the fallacies, as we conceive, into which defendant in error has fallen in his brief.

I.

Alien Enemies.

Since the certiorari was granted in this case this court has determined, in the case of *Watts & Watts Co.* v. *Unione Austraiaco Di Navigazione, etc.*, that the Circuit Court of Appeals was in error in proceeding with the decision of the case, pending hostilities between this country and the German Empire. The case being now before this court, we take it that it will reverse the judgment of the Circuit Court of Appeals; give such decision here upon all points involved as should have been given by that court, making such orders as to the final disposition of the case as it deems just and proper in the premises.

II.

Depositions of Polletin and Heye.

We feel sure that a proper construction of the waiver attached to the interrogatories of Heye and Polletin does not give it the effect contended for by plaintiff and held by the trial court. This point, however, is discussed in our original brief, and will not be further adverted to here. What we wish to do is to make some observations concerning the authorities cited by defendant in error.

Most of the decisions cited in his brief relate to depositions taken *de bene esse* under the Federal Judicature Act authorizing the taking of such depositions, as distinguished from the authorization given in that act

for the taking of depositions under the mode prevailing in the several states. Such are the cases of *Bank* v. *Seton; Shutte* v. *Thompson; Buddicum* v. *Kirk; Rich* v. *Lambert; United States* v. *Boxes of Lace,* cited on page 12 of his brief. It is not without interest, however, to note even in this character of cases what was decided as early as 1857, in the case of *Livingston vs. Pratt,* 15 Fed. Cas. 8417, where it was held that notwithstanding the stipulation that all objections as to the form and manner of taking were waived, yet the deposition should have been returned in all respects as provided by the Act; and because it was not so returned, having been held some time in the hands of counsel, and being returned only on the day of trial, it was suppressed.

While we think the Federal decisions relied on by defendant in error would scarcely, if at all, sustain his position, even had the depositions been taken *de bene esse* under Revised Statutes, Sec. 863; 2 Comp. Stats. Sec. 1472, they certainly do not sustain it when they are taken under the Act of 1892; 27 Stats. At large 7; 3 Comp. Stat. Sec. 1476. That statute provides that "it shall be lawful to take the depositions and testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held." To show how far defendant has gone astray in attempting to dispose of this question by the decisions in the Federal cases cited by him, it is only necessary to quote what he says on page 12 of his brief, as follows:

> "In this case the attorneys for the defendant not only signed the waivers and agreements quoted

by the trial court, but *cross examined* the witnesses without making any protest or reserving any objections, which in itself was a waiver of any right to suppress the depositions or prevent their use as evidence."

Now it is too well known that under the Texas practice when depositions are taken on filed interrogatories the practice is not to object to the interrogatories; that no available objection can be made, except, as to the manner and form of taking and return by motion to quash, and as to relevancy by objection when the evidence is offered; and that crossing the interrogatories is in no respect a waiver of the requisites of the statute as to the mode of taking and method of return. Counsel will search long and in vain for any Texas decision to sustain such a proposition; and we might well challenge him to produce one. It may well be asked: How can an objection going the manner of returning the deposition to court be waived by filing cross interrogatories, which, of necessity, must be filed before the commission is issued and the depososition taken? Could such an effect be given to the filing of cross interrogatories it would be unsafe to propound them.

But counsel say whether depositions be quashed is a matter within the discretion of the court, and that such discretion is not reviewed unless there is a palpable abuse of it; and to sustain this position cite the case of *Railway* v. *Love*, 169 S. W. 922. The distinction between what was decided in this case and what is decided in the cases cited by us—between the exercise of discretion on

the part of the court in determining whether an answer is so meager or so evasive as to call for the suppression of the entire deposition, and the fulfillment of a statutory requirement—is at once apparent. In the Love case there was no claim that the requirements of the statute as to the mode of taking and returning the deposition had not been complied with. No requirement resting for validity on statutory declaration had been unfulfilled; but the answer was claimed to be evasive, which was a matter peculiarly for the determination of the court, one resting in his sound discretion, and it was to this matter that the court was speaking in using the language of the decision. Under similar circumstances other decisions—possibly many—could be found.

For illustration, the case of *Railway* v. *Green*, 90 Tex. 257, at page 263, the court, quoting from another case, say:

> "It is not believed that the authorities would require exclusion of depositions in all cases where the witness has failed to answer every question. Much must be left to the discretion of the court. The rule should not be allowed to be presented to obstruct or retard trials, or to exclude depositions because of a manifest casual failure to answer some unimportant question."

In *Railway* v. *Davis*, 116 S. W. 423, the court decided, quoting from the syllabus:

> "Generally where a witness fails to answer a material question his deposition should be suppressed, but such matters are generally discretionary with the trial court, and its ruling will only be disturbed for the abuse of discretion."

But here there were strict statutory requirements that certain things be done in taking the deposition, and in returning it. These requirements were mandatory. Thus was the law written, and thus must it be followed.

But, say counsel, two Texas decisions, *Garner* v. *Cleveland,* 35 Tex. 74, and *Andrews* v. *Parker,* 48 Tex. 94, sustain their position that a substantial compliance with the statute is all that is required. The first decision was by what is known as the Military Court, in existence in Texas during the reconstruction period following the war between the States. Long ago the decisions of this court were not only discredited, but they have been held to be the law only in the particular case in which the decision was rendered, and notice to be followed as precedents. In *Taylor* v. *Murphy,* 50 Tex. 291, the following language is used:

> "In reply, I have to say, in regard to the first of these cases, that, in my individual opinion, the court by which that case was decided did not exercise its functions under and by virtue of the Constitution and laws of the State of Texas, but merely by virtue of military appointment. And while I am as far as any one from desiring to bring in question the validity of its acts in adjudicating the cases which were disposed of by it, or from detracting from the respect properly due to its opinions, by reason of ability and legal learning of the eminent gentlemen who constituted the court, and who were no doubt selected on this account to discharge the important duties intrusted to them by the general under whose direct control all the functions of government with us were then conducted,

> nevertheless I can not regard the opinion of this tribunal as authoritative exposition of the law involved in the cases upon which it was called to pass, but merely as conclusive and binding determinations of the particular case in which such opinion was expressed."

In *Peek* v. *San Antonio*, 51 Tex. 490, at page 492, it is said:

> "The precise question of the constitutionality of this section of the act under consideration has three times before been decided by this court. It was first decided under its military organization and held to be constitutional. (*San Antonio* v. *Lane*, 32 Tex. 405.) That court not having been organized under the constitution and laws of this state, with all due respect to the members who composed the same as individuals, their opinions have not received the same authoritative sanction given to those of the court as regularly constituted."

Discussing another decision of the same court, in the case of *Robertson* v. *Talmadge*, 174 S. W. 627, at page 629, the Court of Civil Appeals say:

> "This case is not in point. * * * Besides, this opinion was rendered by the 'military court' and is not binding authority."

So much for the case of *Garner* v. *Cleveland*.

It appears from the case of *Andrews* v. *Parker*, *supra*, that the officer who took the deposition personally delivered it to the clerk of the court, it passing through the hands of no intermediate person. The statute under which they were returned is as follows:

"Depositions may be returned to the court either by mail, by a party interested in taking the same, or by any other person; and the clerk or justice taking them from the postoffice shall indorse on them that he received them from the postoffice, and sign his name thereto. If sent otherwise than by mail, the person delivering them into court shall make affidavit before the clerk or justice that he received them from the hands of the officer before whom they were taken; that they have not been out of his possession since, and that they have undergone no alteration." (3 Vernon Sayles' Stats. Sec. 3662.)

It should be noted that there was nothing in this statute forbidding the return directly into court of the depositions by the officer taking them. Concerning their method of return the court say:

"This presents a case where the requirements of the statute have been complied with in substance without doing that which the terms of the statute presupposes would ordinarily be necessary to be done in taking depositions, which is, that they would be transmitted from the officer taking them to the clerk, either by mail, or by some person who would take them and deliver them. All the provisions of the statute relating to their transmission are intended to secure their safe transmission, without alteration, from the hands of the officer who may take them, to the clerk of the court whose duty it is to receive them; evidence of which, made by intermediate persons through whose hands the package may pass, is required to be endorsed on the package in which they were sent. But if the sealed package is passed directly from the officer taking them to the clerk the object of the statute has been fully attained, without the use of intermediate persons, which in this case was evidenced by the cer-

> tificate of the clerk. It would certainly have been a useless thing for Baker, the officer, who may have taken the depositions in the clerk's office in the presence of the clerk, to have passed the sealed package containing them through the post office in the mail at Carthage to come back to the clerk in the court house. The law implicitly trusts the officer who takes the depositions and the officer (the clerk) who receives them; and requires no evidence that they have not altered them, as taken by the one and received by the other. But when intermediate persons, who act, in reference to them, not in an official capacity, are used in the transmission of them, then it is that there must be evidence as provided in the statute, that such intermediate persons have dealt fairly with them."

This authority by no means supports plaintiff's contention. It cannot be said that the American consul or the Department of State acted in an official capacity in reference to the transmission of these depositions. It was no part of their duty to do that. Intermediate persons were used to transmit these depositions, and the certificates required by the statute of Texas were wholly wanting to verify the fact that the depositions were "fairly dealt with," to use the language of the decision.

Quotations from the cases of *Laird* v. *Ivens*, 45 Tex. 621, and *Barber* v. *Geer*, 94 Tex. 581, are made in our original brief; but we trust we may again here refer to those cases. In the quotation we have made in the case of *Laird* v. *Ivens*, this language is found:

> "It is uniformly held that there must be a strictly substantial compliance with the statute in taking depositions, and in the form and manner of returning them."

In *Barber* v. *Geer*, 94 Tex. 581, it appears at page 582, that the motion was made to quash the deposition on the following grounds:

> "1. Because the officer taking such deposition did not write his name across the seal of the envelope in which said deposition was returned into court. 2. Because said officer did not indorse on said envelope the names of the parties to the suit. 3. Because said officer did not indorse on said envelope the name of the witness whose deposition had been taken, as required by law."

The Supreme Court held that the trial court erred in refusing to suppress the deposition, using the language quoted in our brief, closing with the declaration, referring to the statutory requirement for the return of depositions:

> "These requirements are strictly statutory and must be substantially complied with."

III.

Effect of judgment of May 23, 1913, as res adjudicata.

The argument of defendant in error on this question is based on false premises. Had there been only a single award and various sums depending on this award, the suing for and recovery of a single one of these sums, to which the adjudication of the existence of the award was necessary, would have been an adjudication of its existence in a suit brought for recovery of any or all of the other sums. An illustrative case is *Mason Lumber Company* v. *Buchtel*, 101 U. S. 638.

In that case there were various installments to fall due and one guaranty covering all the installments. When one instalment was sued upon it was pleaded that the guaranty was obtained by fraud. The existence of fraud was a necessary issue in the case as to the guaranty, which was a single guaranty underlying all the instalments. It was adjudged in this case that the guaranty was not obtained by fraud, so when a second instalment was sued upon and against the defendant undertook to plead that the guaranty was fraudulently obtained, it was held and could not have been held otherwise, that this question was one adjudicated.

In the instant case, however, there was no single award. On the contrary, there were 160 original awards and 34 appeal awards, making 194 in all. The awards were made in behalf of different persons; on different shipments, arriving at different times; on different claims, where there were different classers and by different arbitrators; but defendant in error treats the case as if there were only a single award, aggregating 312,749.30 German marks, claimed to be equal to $74,820.52 American money. Were his premise true, his conclusion would follow; but the premise being altogether false, the conclusion is erroneous.

An examination of his authorities shows that they would sustain his position if his premises were correct, but they quite fail to sustain it, based on his false premises.

The case of *Southern Pacific Co.* v. *United States*, 168 U. S. 1, was brought to obtain a decree quieting

the title of the United States to large bodies of land in California. Congress had granted to the Atlantic and Pacific Railway Company twenty sections per mile on each side of its line of railroad in the territories; and ten sections per mile on each side in the states; but the grant did not designate the particular sections. This was to be determined by the route actually selected, designated and delineated on the map, which was required by the act to be filed in the office of the Commissioner of the General Land Office, and had been filed there. The validity of the maps was attacked on the ground that they were not maps of definite location; that they did not sufficiently designate the line. In a case between the same parties the same contention had been made, and it was there decided that the maps were valid; that they did designate the line—were a definite location of it from Springfield, Missouri, to San Buenaventura, California. That fact having been adjudicated in the first case was, of course, *res adjudicata* between the same parties in the second case. After the designation of the line it was easy to mark out the sections granted to the railway in accordance with the location of that line. In determining, therefore, whether any section was in the grant, it was only necessary to look to the line as located by the maps, and such designation and location having been adjudicated for the whole line from Springfield to San Buenaventura in the first case could not again be inquired into in the second case.

In *Webster* v. *Mann*, 56 Texas, 119, cited on page 50 of the brief of defendant in error, there was only

one deed which conveyed lots 8, 9, 10 and 11. In a prior suit between the same parties, or rather between one party and another with whom the claimants in the second suit stood in privity, in which was involved a part of the lots, it was held that the deed was valid. In the second suit it was held, of course, that this question was adjudicated as to the other lots.

It would serve no useful purpose to discuss the other decisions cited by defendant in error on this point. The same principle will be found running through all of them.

Defendant's argument is founded upon the false assumption that the judgment in the first case adjudicated the validity of all the awards, but the judgment itself is the best evidence of what it adjudicated, and he would endeavor in vain to point out any place where it was adjudicated that 312,749.30 German marks were awarded to plaintiff, nor could he show wherein this issue was in any way involved in the first adjudication. The pleadings in the first suit, the charge, the verdict and judgment were all that was introduced in this case to establish what was actually determined in the first case. The depositions of Heye and Polletin were only offered to show—and only did show—not what was adjudicated in the first case, but to establish that defendant in error had paid the remaining awards, and the testimony was so received and considered by the court. This is made clear by reference to that part of the oral charge shown on pages 41 and 42 of the brief of defendant in error. A reading of the interrogatories quoted by the

trial judge discloses that the fact of payment of the remaining amounts claimed was all that defendant in error was attempting to establish by that testimony. We insist there is not a particle of testimony showing that the first judgment established the validity of all the arbitrations.

On page 51, defendant in error announces the proposition that "the trial court's finding in the present case that the validity of the Bremen awards in their entirety was an issue in the first suit, and conclusively determined therein, seems to be a finding on a mixed matter of law and fact, and therefore not reviewable in appellate courts unless it is clear to this court that such finding is wholly without support in the record," and cites *Railway* v. *Fraloff*, 100 U. S. 24, to support his proposition.

Even if this proposition announced the correct principle of law, which we do not concede, still we insist that the finding in this case is "wholly without support in the record," and to show this we again invite the court's attention to the entire record offered in evidence. It is mainly shown in the brief of defendant in error and consisted of (a) the pleadings in the first suit; (b) the charge of the court in that suit; (c) the verdict and judgment in the first suit; and (d) the depositions of Heye and Polletin. These last, of course, were not received and could not be received to show what was actually adjudicated in the first suit; and, as shown above, were not treated by the court as supplying this

proof, but were only to show payment of the balance of the alleged awards. What is said here equally applies to the quotation from Foster's Federal Practice, made at page 52 of defendant's brief.

IV.

Limitation.

The proposition here made by defendant in error is not correct. The finding of the trial court that Sec. 477 of the German Civil Code did not apply, was a finding or conclusion of law, and not one of fact. The finding of what that section is, is a finding of fact not attempted to be controverted here; but the construction placed on that section in its application to the case in hand is a conclusion of law. But even had it been one of fact it was wholly without support in the evidence, contrary to the evidence, and hence itself raises a question of law reviewable by this court.

As to the question of variance, we shall only note that it came too late after the evidence was introduced, even if meritorious. The evidence was admitted without this objection being urged. Had it been timely urged, and sustained, under well established practice, the pleadings could, and then would, have been amended.

Section 477 is shown on page 69 of our brief; and we submit that either a casual or a careful reading of it shows that the court erred as a matter of law when he held that the cause of action was not barred. In addition to this, Dr. Butte, whose qualification as an ex-

pert was not even questioned in the trial court, testified that the action was barred. A reading of his testimony shown in the record on pages 91-97, both inclusive, shows it not subject to the criticism made by defendant in error. Defendant in error, by quoting only one sentence of his testimony on page 56, attempts to discredit his entire testimony by contending that the quotation contradicts other parts of it. To say the least of it, this method is hardly fair to the witness, because one has only to read the entire cross examination (and this sentence is part of the cross examination, instead of being part of the examination in chief, as indicated by defendant in error) to show exactly what he meant by the sentence quoted. He simply meant, as stated further on in his testimony, that the fact that the cotton had been arbitrated did not take it out of the rule of the statute. This is made clear, among other places, in his testimony, by his answer to the court shown on page 58 of the brief of defendant in error.

Defendant in error labors hard to make the classing of the cotton by the Bremen classers a decree of a "tribunal" within the meaning of Section 220 (p. 60 of his brief). The trial court did not so find, and it is perfectly plain that this provision does not include the so-called awards in this case. Prof. Butte explains this fully in his answer to the court shown on pages 95 and 96 of the record, and on page 59 of the brief of defendant in error, wherein he says in part:

> "It (such awards) creates no additional liability between the parties beyond that which grows

out of the contract of sale. These appraising commissions are very common in Germany. The appraisers are experts and their findings are not to be taken as arbitral awards but findings of fact binding on the parties. The party who feels himself aggrieved in a transaction of that kind must see to it that the finding of the appraisers is made within the period of six months, so that in the event the other party fails to pay what the appraisers find to be due, he must bring his suit within six months, and then the finding of fact of the appraisers can not be challenged."

This reply of the witness, testifying of the German law and its effect, is a complete answer to the argument of counsel that the finding of the appraisers is the finding of a "special tribunal."

Defendant in error, in his proposition on page 67 of his brief, does not distinguish between the finding of fact (what the law of a foreign country is) and the application of that law to the facts of the case, the former being a finding of fact, the latter a conclusion of law. The case cited by him of *Paper Company* v. *Warner*, 99 Fed. 187, clearly brings out the distinction. The referee was called upon to find, and did find, what provisions of the English statutes were in force—a finding of fact. It does not follow that if the referee misconstrued those laws as applied to the facts that this would not be subject to review. Indeed, the contrary is true. In this case the trial judge correctly found Section 477 to be the law as before suggested, but when he found:

"And therefore the court is of the opinion that under these circumstances the six months' statute does not apply,"

this finding ceased to be one of fact and became a conclusion of law. The authorities cited on page 68 of the brief of defendant in error are subject to the same criticism.

Lee v. *Stowe*, 57 Tex. 444, page 69 of brief of defendant in error, is cited in support of the proposition that defendant in error was under a moral obligation to pay the claims, and therefore had the right to pay them, though extinguished by limitation, both as to defendant in error and plaintiff in error. Plaintiffs in that case could have pleaded the statute of frauds, but did not. There is a marked difference between that case and this. Limitation bars a claim; the statute of frauds does not. But, aside from this, in the case cited the obligation was still valid as to the defendants, so that they were not jeopardized in the least by the failure of plaintiffs to plead the statute of frauds. Here the claim is barred, both as to defendant in error and plaintiff in error. Defendant in error, by a voluntary payment, could not impose a new obligation upon plaintiff in error, nor by such payment remove the bar of the statute as to him. The authorities cited on pages 70 and 72 of our brief we think fully establish this. If defendant in error felt under moral obligation to pay these claims to the German buyer, he had no right to pay them, when, under no legal obligation so to do, so as to compel plaintiff in error to refund same to him, thereby creating an obligation on plaintiff in error, which in law did not exist.

Respectfully submitted,

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No. 9[redacted]4[redacted]76

IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, Petitioner,

vs.

CARL R. HEYE, Respondent.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, Petitioner,

vs.

CARL R. HEYE, Respondent.

BRIEF FOR RESPONDENT.

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ROBT. M. ROWLAND,
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Attorneys for Respondent.

Questions (a), (b), (c), (d) and (e) presented on pages 7 and 8 of the printed petition for certiorari will herein be considered in their order.

QUESTION (a)

The following language of Justice Clifford in the case of *Hanger vs. Abbott*, 6 Wallace 532, which case is cited and quoted from in petitioner's brief, states the sole basis and reason underlying the doctrine denying an alien enemy the right to sue in the courts of this country:

> "We preclude him during the war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy"

In the instant case that basis or reason does not

exist, for the judgment of the Circuit Court of Appeals fully protects the interests of the United States by requiring the money due Heye on the judgment of the trial court to be paid to the clerk of the trial court, and not to Heye, and to be by said clerk paid over into the hands of the Alien Property Custodian appointed by the President under the "Trading with the Enemy Act" enacted by Congress Not only does this disposition of the proceeds of the judgment make it impossible for the money to reach Germany and be used as sinews of war against our country and its allies, but such disposition of the proceeds goes further and makes it both possible and probable that said money will be invested in Liberty Bonds, until the close of the war, and thus be made to help fight the battles of Democracy.

In our judgment the foregoing is a complete answer to the first ground set up in the petition for certiorari; but we beg to call attention to a few authorities which in the application of the alien enemy doctrine establish a distinction between cases where the alien plaintiff becomes an enemy before his case goes to judgment in the trial court and cases where he is an alien friend at the time he recovers his judgment, but by the subsequent outbreak of war between the two nations in question becomes an alien enemy before the other party's appeal or writ of error is submitted in the higher court.

A reading of the authorities cited in the brief accompanying the petition for certiorari will disclose that the diligence of the able attorneys for petitioner has not rewarded them with the discovery of a single case holding that it is proper to dismiss or suspend the suit or in any way delay the submission of the cause in the appellate court and the affirmance of the judgment below because of the fact that since the rendition of judgment in the trial court and before time for submission of the case on writ of error in the appellate court war has intervened between the country

of the forum and the country wherein the plaintiff in the action has his residence and citizenship

On the contrary, we find three decisions by very eminent courts declaring that under such circumstances as exist in the instant case the fact of the plaintiff becoming an alien enemy after the rendition of the judgment in his favor in the trial court furnishes no reason whatever for the appellate court to refuse submission of his case or affirmance and collection of his judgment if no reversible error is found in the record. The case of *Owens vs. Hanney*, 9 Cranch, 180, is very brief and pointed, and we beg to quote it in full as follows:

"Error to the Circuit Court for the District Georgia, in an action of assumpsit, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

"The plaintiff below is stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia.

"A demurrer to the declaration having been overruled, the defendant pleaded non assumpsit, upon which issue the verdict and judgment were against him in May, 1811, and he brought his writ of error.

"In the transcript of the record which came up, a blank is left for the names of the jurors, but in other respects the record appears to be perfect. The verdict and judgment are fully stated.

"War was declared by the United States against Great Britain on the 18th of June, 1812, and continued at the time of the argument in this court.

"Harper, for the plaintiff in error, contended:

"1. That as it appeared upon the record that the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and,

"2. That the omission of the names of the jurors was fatal inasmuch as it did not appear

from the record that it was the verdict of a legal jury.

"March 1st. Absent—Todd, J.

"Marshall, Ch. J., stated the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point.

"Judgment affirmed with costs."

Any efforts to explain away or discredit this decision of the Supreme Court of the United States, announced through the great Chief Justice himself, must be unavailing. We cannot imagine any reason why its authority and binding force should be questioned. Two points were clearly presented to this court by the record in that case, one of which was the very point now under discussion and the other was the contention that the omission of the names of the jurors in the record was fatal to the validity of the judgment below. Both points were necessarily decided, but only the latter was discussed by Chief Justice Marshall, and that very briefly. The only reason that suggests itself why the discussion was confined to the second point is that the court deemed it more debatable than the other and considered that the law with reference to the other was so clear that discussion did not appear to be necessary. Inasmuch as both points were clearly and squarely presented to the court and both had to be passed upon in order to arrive at an affirmance of the judgment, there is no escape from the conclusion that both points were considered and actually decided by the court. After diligent search we have been unable to find where the Supreme Court of the United States or any other court has ever cited with disapproval or questioned the authority of this case of *Owens vs. Hanney*. On the contrary, we find it cited with approval by the Supreme Judicial Court of Massachusetts, in the case of *Kershaw vs. Kelsey*, 100 Mass., 561, and by Judge Speer of the United States District Court for the Southern District of Georgia in the case of *Plettenberg vs. Kalmon*, 241 Fed., 605.

In the case last cited Judge Speer, after discussing the case of *Howes vs. Chester*, 33 Ga., 89, and expressing his disapproval thereof, said:

"Besides, it seems in conflict with Owens vs. Hanney, 9 Cranch, 179, 3 L. Ed., 697. That, too, was a case from this State. The action had been brought by a British subject against a citizen of the United States, and judgment obtained in 1811. An appeal was taken, and war was declared with Great Britain on June 18, 1812, and continued at the time the case was argued in the Supreme Court. It appears from the report that counsel for the American litigant argued that the plaintiff was an alien enemy, and for that reason the court ought not to affirm the judgment against a citizen of the United States. It was affirmed, however, through Chief Justice Marshall.

"True, the Chief Justice said nothing on the precise point here involved. It may not, however, be doubted that it was considered by the illustrious jurist, who had been the associate of Patrick Henry in the memorable trial, Ware vs. Hylton, 3 Dall., 199, 1 L. Ed., 568, in which they jointly sought to defeat enforcement of the British debts. Besides, with the evolution of law, the courts of the English-speaking peoples exhibit greater magnanimity in affording opportunity of redress to alien enemies. Notwithstanding a ruling of Sir William Scott, afterwards Lord Stowell, made in 1799, to the contrary, the British prize courts of today hear any alien enemy asserting rights under a convention of the Hague Peace Conference. Shall the courts of the United States then wholly deny a hearing to one, not such when he here sought redress, but who has since become an alien enemy? To do this, would not, in my judgment, accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to the German people when it proclaimed war in defense of freedom and of a common humanity.

"My conclusion, therefore, is that the action should not be dismissed, but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

In *Kershaw vs. Kelsey*, 100 Mass., 561, the Supreme Judicial Court of Massachusetts, speaking by Judge Horace Gray, used this language at page 564 of the report:

"The reasons assigned by common law judges for the plea of alien enemy are, that an enemy to our government shall not have the benefit and protection of its laws in its courts; and that the fruits of the action may not be remitted to a hostile country, and so furnish resources to the enemy. Hutchinson vs. Brock, 11 Mass., 122. Sparenburgh vs. Bannatyne, 1 B. & P., 170. M'Connell vs. Hector, 3 B. & P., 114. The objection has not been much favored; for even in a real action, after the plaintiff has recovered judgment, alien enemy at the time of the original suit is no good plea to scire facias to obtain an execution; West vs. Sutton, 2 Ld. Raym., 853; S. C. 1 Salk., 2; Holt, 3; and in a personal action brought by an alien friend, his becoming an enemy by the breaking out of war, which could not have been pleaded earlier, has been held no ground for staying judgment after verdict, or execution after judgment, or affirmance of a judgment on error. Venbrynen vs Wilson, 9 East, 321. Buckley vs. Lyttle, 10 Johns, 117. Owens vs. Hanney, 9 Cranch, 180."

Another case in point here is *Buckley vs. Lyttle*, 10 Johns. 117, which was decided by the New York Supreme Court of Judicature while that tribunal was presided over by James Kent, the great chancellor and commentator. This opinion is also short and to the point, and we take the liberty of quoting it in full, as follows:

"A motion was made in this cause, in behalf of the defendants, to set aside the execution, on an affidavit, stating that the judgment was obtained prior to the late declaration of war against Great Britain; that the plaintiff is an alien enemy, and resided at the time when the judgment was obtained, and now resides in Canada, within the territory of Great Britain.

"Per Curiam. The case of Van Brynen et al. vs. Wilson, 9 East, 321, is in point, to show that the court will not interfere, in such a case in this way. In that case the plaintiffs, after verdict, became alien enemies, and the court of K. B. refused to stay the judgment and execution, on motion. They said 'that if the defendant had any remedy by law, he might avail himself of it, if so advised, but that they would not interfere in the manner proposed, on such an occasion.' The motion must be denied."

The case of *Bishop vs. Jones and Petty*, cited in the petition for certiorari was, like the other authorities cited in support of said petition, a case where the plea of alien enemy was actually interposed in the trial court and before judgment rendered. That is, of course, an entirely different situation from the one now before this court and which was before it in the case of *Owens vs. Hanney*. However, it was ruled in said Texas case that even if a state of war had supervened between the filing of the suit and the trial of the case in the court below, the plea of alien enemy interposed at the trial would not cause the dismissal of the suit, but only the staying of proceedings until the termination of the war, at which time the prosecution of the suit could be resumed. The court further held that, inasmuch as the war had ended before it was called upon to decide the case upon appeal, the error, if such there was, upon the part of the trial court in not staying the proceedings until the termination of hostilities had become immaterial, and therefore the Supreme Court affirmed the judg-

ment. The following language quoted from the opinion in that case is in harmony with the other authorities cited by us showing that the plea of alien enemy in these modern and enlightened times is not one favored by the courts:

> "Their plea was merely dilatory, and would only have stayed the appellees' suit until the termination of the war. Though it should be upheld and sustained in cases to which it is applicable when properly presented, yet it is called in the books an 'odious plea' (Clark vs. Morey, supra), and it will not, therefore, be aided by construction."

In view of the foregoing decisions, at least two of which are directly in point here, and in view of the fact that the counsel for petitioner have been able to cite nothing to the contrary, and in view of the further fact that the Circuit Court of Appeals is strictly a court of errors, whose sole province is to examine the record sent up from the lower court and determine whether or not it shows reversible error committed by the trial court, we think it quite clear that the motion to suspend consideration of the case until the end of the war was properly overruled by the Circuit Court of Appeals.

QUESTION (b).

Both points presented by petitioner in connection with Question (b) are sufficiently answered by the following quotation from the brief filed for defendant in error in the Circuit Court of Appeals:

"COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S EIGHTH AND NINTH PROPOSITIONS.

In view of the agreements or waivers signed by counsel for the defendant, under which the depositions of Heye and Polletin were taken, and in view of the fact that defendant, by its attorneys, propounded cross interrogatories to these witness without reserving any objections, and in view of the further fact that the manner of

taking and returning these depositions was substantially regular and wholly free from any suspicion of unfairness, the court properly refused to suppress said depositions and properly allowed them to be used as evidence.

STATEMENT.

In ruling on the motion to suppress the depositions of Carl R. Heye and Oscar Polletin the court, after referring to and commenting upon certain Federal statutes concerning depositions, said:

> "The other section called to my attention is this Act of March 9, 1892, which provides that in addition to the mode of taking depositions of witnesses in cases pending at law or in equity in the District or Circuit Courts of the United States, it is lawful to take depositions of witnesses in the mode provided by the laws of the State in which the courts are held. There seems to have been an effort to pursue the method provided in the Act of March, 1892, in taking these depositions, and here as a matter of fact is what happened: The plaintiff in this case propounded the interrogatories to the witnesses. The defendant company by its attorneys propounded cross interrogatories to those witnesses, and upon those direct and cross interrogatories the depositions were taken, which depositions are now sought to be quashed. Plaintiff's attorneys at the conclusion of the interrogatories prepared an agreement which I am going to read:
>
> " 'Time, notice, copy and issuance of commission are hereby waived, and it is agreed that any qualified officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories with the effect as if a commission had regularly issued.'
>
> "That was the language as originally prepared. Now, it appears beyond controversy that that was submitted to attorneys for defendant and they struck out the following words and added the following words: In line one they eliminated the words 'and

issuance of commission,' and in line two they erased the words 'any qualified,' in line four they erased the words 'in like effect as if a,' and then following the word 'commission' in line five they struck out the words 'had regularly issued.' They added the word 'but' in line four, and added after the word 'commission' the words 'is not waived,' so that as changed the language was as follows:

" 'Time, notice and copy are hereby waived, and it is agreed that officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories, but commission is not waived.'

"To the interrogatories to the witness, Oscar Polletin, this is the language finally signed by counsel for defendant:

" 'Time, notice and copy are hereby waived, and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories.'

"The writing which in itself is scant, contains a waiver, and an agreement as well. I think I must consider it in the light of what happened at the time the agreement was made. Here was an effort by plaintiff's counsel to take the depositions of the witnesses, Heye and Polletin, in answer to the interrogatories then and there tendered to counsel for defendant. It must have been in the minds of all the parties that the purpose was to have Heye appear and answer these interrogatories, and such cross interrogatories as defendant's counsel might file. Defendant's counsel did file their cross interrogatories, after signing the agreement I have read. I must give that agreement its common sense construction, and that is that the proper officer might have these witnesses appear before him and answer the interrogatories and swear to them, and the officer transmit the answers to the court here, for that was evidently the purpose of counsel when they signed the agreement and when the inter-

rogatories and cross interrogatories were prepared. Time, notice and copy were waived; in fact everything was waived except the issuance of commission, and then follows the agreement which says that it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories. That was an agreement that they might take the answers and return the answers on those direct and cross interrogatories. The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be taken and used in court in this trial as evidence. The parties had the power as well as the right to make this agreement and have it upheld by the court. They had the right to agree to an absolute final judgment in this case, and, of course, could agree to anything as to the procedure leading up to the judgment.

"That presents for decision before me the proposition as to whether the method in which the depositions were returned was fair and free from suspicion. It was a substantial compliance with the State statute on the subject of the return of depositions, and seems to have been an effort to comply with it.

"An inspection of the envelope in which these depositions were returned shows that the case was properly styled, and that the officer who took the depositions made this certificate:

" 'I, Dr. jur Robert Voigt, the officer before whom the within depositions were taken, do hereby certify that I, in person, deposit this package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission on this day.

'Bremen, November 13th, 1916.'

"Signed with the signature of the officer and seal.

" Following that is this certificate:

" 'Received this package on the 13th day of November, 1916, from the hands of Dr. jur Robt.

Voigt, the officer before whom the depositions were taken, and forwarded same the 25th day of November, in the official mail pouch to the Department of State, Washington, D. C., for further transmission to the addressee.

'WILLIAM THOMAS FEE,'

"Consul of the United States of America,

'Bremen, Germany.'

"I have before me as a part of the record this envelope which bears the words 'Department of State, U. S. A.,' and shows by endorsement on it that it came by registered mail and that it was directed to the clerk of the United States District Court, Sherman, Texas. I can only infer that the envelope containing the depositions, with the certificates I have read, reached here in the white envelope which bears the evidences of having been sent here by the Department of State of the United States of America. I have before me the clerk's certificate on the envelope containing the depositions that he received the same from the postoffice at Sherman on the 30th day of December, 1916, and that it was opened at the request of the attorneys for the defendant. I hold that under the circumstances which I am bound to consider in connection with the taking and returning of these depositions, and the conditions which prevail in reference to the method by which mail and intelligence can be transmitted under the conditions produced by the great war, the method of taking and returning the depositions was a substantial compliance with the law, and a sufficient compliance in the light of the agreement made; that the manner of taking and returning the depositions is free from suspicion of unfairness, and I therefore overrule the motion to quash." (Record, pp. 101-105).

AUTHORITIES.

Bank vs. Seton, 1 Pet., 299, 7 L. Ed., 152.
Shutte vs. Thompson, 15 Wall., 151, 21 L. Ed., 123.

Buddicum vs. Kirk, 3 Cranch, 293, 2 L. Ed., 44.
Rich vs. Lambert, 12 How., 347, 13 L. Ed., 1017.
United States vs. Boxes of Lace, 92 Fed., 601.
4 Corp. Jur., p. 805.
Railway Co. vs. Love, 169 S. W., 922.

ARGUMENT.

We think a reading of the trial court's order and opinion overruling the motion to quash the depositions of Heye and Polletin will make it clear to this court that the ruling was correct. (Record, pp. 100-105).

In addition to referring to the trial court's discussion of this matter, we beg to call attention to a few authorities. In this case the attorneys for the defendant not only signed the waivers and agreements quoted by the trial court, but cross-examined the witnesses without making any protest or reserving any objections, which in itself was a waiver of any right to suppress the depositions or prevent their use as evidence. In *Bank vs. Seton*, 1 Pet., 299, 7 L. Ed., 152, the court said:

> "An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.
>
> "Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity."

In Rich vs. Lambert, 12 How., 347, the court said:

> "Further evidence has been taken, on the part of the respondents, since the appeal to this court was entered, which is objected to by the appellants.
>
> "The Act of 3d March, 1803, (2 Stat. at Large, 244), allows additional evidence to be furnished by either party before this court in cases of appeals

in admiralty and prize causes. And by the 27th rule of the court the evidence is to be taken under a commission to be issued from this court, or from the Circuit Court, under the direction of any one of the judges thereof.

"The objection taken to the evidence is that it does not appear from the record that any order was obtained from either court for the issuing of the commission. We have, however, before us the commission itself, issued in the usual form by the clerk of the Circuit Court, and in the execution of which both parties have joined. An order, therefore, must have been entered, or, if not, it was waived by the act of the parties in suing out the commission, and joining in its execution. For these reasons we think the further evidence furnished to this court admissible."

"The case of *United States vs. Boxes of Lace*, 92 Fed., 601, is directly in point here as to the manner of making return of the depositions. Note the following from the opinion:

"The commissions on the return were properly addressed to the clerk of the court, as directed; and as directed they were sent by mail. It is immaterial that they were forwarded through the embassy bag by mail to Washington, and thence to the clerk, instead of directly to New York."

In 4 *Corpus Juris*, p. 805, the author says:

"The action of a trial court in regard to the taking or the suppressing of depositions is ordinarily largely one of discretion, and in such cases only reviewable in case of palpable abuse."

To the same effect is the case of *Railway Co. vs. Love* (Tex. Civ. App.), 169 S. W., 922."

In addition to the foregoing we beg to present certain further considerations. Both Heye and Polletin were undoubtedly competent witnesses in this case and in the court in which the same was pending. Sec-

tion 1464 of U. S. Complied Statutes, 1916 (which is Rev. Stat., Sec. 858, as amended in 1906), provides:

> "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

The Texas statute on the subject (Rev. Stat. of 1911, Art. 3688) reads:

> "No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue tried."

The *de bene esse* statute (U. S. Comp. Stat., Sec. 1472) provides that the depositions of *any witness* may be taken when the conditions therein named exist. This undoubtedly includes parties to the suit when they are competent witnesses according to the laws of the State where the Federal court in question is sitting and when the requisite conditions as to distance of residence from place of holding court, etc., exist. See *Lowrey vs. Kusworm*, 66 Fed., 539; *Hartmon vs. Feenaughty*, 139 Fed., 887; *Blood vs. Morrin*, 140 Fed., 918.

It is likewise true that under the *dedimus protestatem* statute (U. S. Comp. Stat., Sec. 1477) the depositions of parties, as well as other competent witnesses, may be taken and used. This statute does not use the expression "any witness," but from its language and purpose and the fact that it makes no distinction between witnesses who are parties and witnesses who are not parties, the conclusion stated is unavoidable. Under the *dedimus* statute the depositions of witnesses in foreign countries may be taken. See *Campania, etc., vs. Ingraham et al.*, 180 Fed., 516; *Stein vs. Bowman*, 13 Pet., 209, 10 L. Ed., 129.

It is, therefore, quite evident that, if the attorneys for the Birge-Forbes Company had not made the agreements and waivers set out and discussed by Judge Russell in the quotation hereinabove made from the

brief in the Circuit Court of Appeals, the attorneys for Heye could and would have applied to and obtained from the court a *dedimus protestatem* commission, or a commission under the Act of 1892, and secured in that way the depositions of Heye and Polletin. The Birge-Forbes Co., through its attorneys of record, had the right to waive such formalities and let the depositions be taken in the manner they were taken. This the Birge-Forbes Co. did by the waivers and agreements aforesaid.

There was a substantial compliance with the statutes of Texas as to the manner of taking and returning these depositions; and in our judgment they would not have been suppressed if the case had been pending in one of the courts of that State. The only irregularity claimed is with reference to the mere transmission of the depositions from Bremen, Germany, to Sherman, Texas; and the exact mannenr of transmission is the least important part of the proceedings.

In *Garner vs. Cleveland*, 35 Tex., 74, the Supreme Court of Texas said:

> "Article 3729, Paschal's Digest, which points out the mode in which depositions may be transmitted by mail to the clerk of the court in which they are to be used, is a directory statute, and, as this court has repeatedly decided, a substantial compliance with the directions of the statute is all that is required where there is nothing to raise a presumption of fraud."

In *Andrews vs. Parker*, 48 Tex., 94, the officer taking the depositions personally handed them to the clerk of the court instead of mailing them or sending them by the hand of another person, the only two modes of transmission for which there was express statutory authority. The court said:

> "This presents a case where the requirements of the statute have been complied with in substance, without doing that which the terms of the statute presuppose would ordinarily be necessary to be done

> in taking depositions, which is, that they would be transmitted from the officer taking them to the clerk, either by mail, or by some person who would take them and deliver them."

The court then proceeded to hold that the trial court was right in refusing to suppress the depositions. Borrowing here an expression from the brief of the petitioner in the instant case, the officer taking the depositions in the *Andrews vs. Parker* case substituted for the exact statutory mode of return a mode which he thought "just as good;" and the Supreme Court of Texas agreed with him that it was "just as good."

In *United States vs. Reyburn,* 6 Pet., 352, the Supreme Court of the United States used this striking expression:

> "Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed."

The same may be said of the rules governing the return of evidence into court when taken at a distance in the form of depositions; and in fact the language quoted applies to all legal rules.

QUESTION (c).

The point made in Question (c) in the petition for certiorari is answered by the following quotation from defendant in error's brief in the Circuit Court of Appeals:

"FIRST COUNTER-PROPOSITION TO PLAINTIFF IN ERROR'S FIRST, SECOND, THIRD AND FOURTH PROPOSITIONS.

The judgment of May 23, 1913, fully established the validity of the Bremen Awards as a whole, the undisputed amount of which awards was 312,749.30 German marks, the equivalent of which in American money was about $74,820.52. In the trial of the first case between

Heye and the Birge-Forbes Co., which went to judgment May 23, 1913, all the arbitration awards for the cotton season of 1910-1911 were involved together, were in exactly the same category, had exactly the same status, were subjected to exactly the same attacks, and under the issues made were necessarily required to stand as a whole or fall as a whole. They stood as a whole, and the only reason for not then rendering judgment for the full amount of all the awards and interest thereon was that the suit was premature to the extent of the amount not actually paid by Heye at that time on the awards, he being held to be a surety or guarantor for the Birge-Forbes Company and his cause of action not ripe until actual payment by him. Therefore, it being shown by the undisputed evidence that he had made partial payments aggregating $36,610.90, he was given judgment for that amount (plus a small sum for other items not of interest here), and was denied a recovery for the rest until he should pay the rest.

STATEMENT.

The pleadings upon which the first case between these parties was tried were introduced by the plaintiff at the trial of the present case for the purpose of showing the issues in the other suit and to support his allegations of *res adjudicata*. (Record, 105-127).

Plaintiff's original petition in the first suit, which was filed November 7, 1911, after stating the jurisdictional facts and showing that for a number of years Heye was the selling agent for the Birge-Forbes Co. on the Bremen cotton market, alleged:

"That it was a part of said contract and arrangement as so defined and explained and as mutually understood and acted upon by both parties that all cotton offered by defendant for sale through plaintiff was to be even running cotton, of good color and staple; that all sales were to be made subject to and to be governed by Bremen class and arbitration; and that all sales were to be made subject to and to be governed by the rules of the Bremen Cotton Exchange.

"That acting under and in accordance with the aforesaid contract and arrangement, plaintiff made sundry sales for defendant, at Bremen, Germany, of large quantities of cotton during the time intervening between about Oct. 1st, 1910, and about May 1st, 1911, such sales being made to a number of different buyers, that the buyers of said cotton purchased the same under the rules of the Bremen Cotton Exchange and subject to Bremen class and abritration. That the rules of the Bremen Cotton Exchange required all disputes and controversies between seller and buyer as to the staple, class, grade or quality of cotton sold to be conclusively determined and settled by means of arbitration, the procedure in such arbitration proceedings being fully defined and set forth in the published rules of said Bremen Cotton Exchange.

"That in the sales of cotton last aforesaid, made by plaintiff for defendant, disputes and controversies did arise between the seller and the buyers as to the staple, class, and quality of the cotton sold. That the buyers of said cotton made claim that the cotton delivered to them was not up to the staple, quality and description offered by defendant, and upon which the price was based, and that the cotton delivered was not in compliance with the contracts of sale whereupon such claims, disputes and controversies were duly and regularly submitted to arbitration under and in accordance with the rules of the Bremen Cotton Exchange, the final result of such arbitrations being that awards or allowances aggregating the sum of, to-wit, 312,749.30 German marks, equivalent to about $74,-334.33, were made in favor of said purchasers on their claims against defendant.

"That in such arbitration proceedings plaintiff represented the interests of defendant, as his authority and duty required, and obtained for it the best results that were in his power or that were practicable. That said arbitration proceedings were in all respects regular, and the awards or allowances aforesaid were made in good faith.

"The defendant was duly, legally, promptly and within the time prescribed by the rules and customs of the Bremen Cotton Exchange, notified of the pendency of such arbitration proceedings and also of the results of same upon their termination.

"That upon the final termination of said arbitrations, plaintiff, by virtue of his aforesaid contract and arrangement with defendant and under the rules of said Bremen Cotton Exchange, became bound and legally liable to pay at once to said purchasers the said awards or allowances made to them by the arbitrators. That shortly after the termination of said arbitrations plaintiff paid out on said award or allowances the sum of, to-wit, $30,000.00, and still owes and will have to pay the further sum of, to-wit, $44,334.33. That by the aforesaid contract and arrangement between plaintiff and defendant and by the custom and course of business between them and by the rules of the Bremen Cotton Exchange, defendant became liable and promised plaintiff to pay to him immediately upon the termination of said arbitrations, or else upon demand, the said sum of, to-wit, $74,334.33, in order to protect and indemnify plaintiff against any loss by reason of his liability to the purchasers of the cotton." (Record, 107-109).

"In said first suit the defendant, the Birge-Forbes Co., pleaded, in addition to the general denial, that on August 21, 1908, it had instructed plaintiff by letter that in future sales he was to have it agreed with the buyers that: "Arbitration differences for grade and staple will be those in effect (the actual differences made on C. I. F. and six cotton sold by us) at the time of the sale instead of the last day of landing;" that plaintiff had failed to carry out completely this instruction in that he had only stipulated thereafter in each sale contract that the arbitrators in Bremen were to apply the differences that existed on the date of sale instead of those that prevailed on the last day of landing of the cargo, as was ordinarily done under the Bremen rules, whereas defendant contended that

he should have gone further and also have stipulated for the application by the arbitrators of such differences in value between different grades or staples of cotton as were fixed by the Birge-Forbes Company's own sales of C. I. F. and 6% cotton, instead of the application of such differences as were fixed by the Bremen spot market and evidenced by the printed statements promulgated by the Bremen Cotton Exchange; that such alleged failure of plaintiff to obey instructions resulted in injury to said Birge-Forbes Company in the arbitrations at Bremen, and should prevent plaintiff from recovering reimbursement for his payments on said arbitration awards; that it was the duty of plaintiff, Heye, as selling agent for the Birge-Forbes Company, in each case where arbitration was demanded by the buyer of the cotton at Bremen, to join with the buyer in drawing samples of the cotton and to see to the correctness of the "Note of Instructions" that under the rules of the Bremen Cotton Exchange would go with the jointly drawn samples to the "sample room" of said Exchange, where the arbritrators or "classers" appointed under the rules of said Exchange would examine the samples and the note of instructions accompanying same and stating the conditions under which the cotton was to be arbitrated, and would then make their decision and award; that Heye failed to perform this alleged duty with reference to the drawing of the samples and the making of the notes of instructions, resulting in injury to defendant's rights and preventing plaintiff from recovering any reimbursement; that by reason of plaintiff's alleged disregard of the instructions given him in said letter of August 21, 1908, and by reason of his alleged failure of duty with respect to the samples and the notes of instructions, all the arbitrations involved in the suit (being those for the season of 1910-1911) were null and void because not conducted under terms of submission agreed to by defendant, but under different and unauthorized terms; that on January 27, 1911, by written agreement entered into at Sherman, Texas, between Heye and the Birge-Forbes Co., said

Heye waived and abandoned said Bremen awards and agreed to a new arbitration to be had at Liverpool under conditions set out in said writing; and that thereafter Heye wrongfully prevented the making of any arbitrations at Liverpool, and was now cut off from recovering on the Bremen awards because of the fact of his making the agreement for arbitration of the same cotton at Liverpool. (Record, 110-127).

"In said first suit Heye, by supplemental petition, denied the allegations of the defendant and further pleaded that on receiving from the Birge-Forbes Co. the aforesaid letter of August 21, 1908, he understood it to insist only that in all future sales he was to make the sale contract so read that in arbitrations of the cotton the date of the sale was to be looked to and not the last day of landing of the cargo, the other suggestion in the letter about applying differences made by Birge-Forbes Co.'s own sales being wholly impracticable; that he promptly wrote to the Birge-Forbes Co. and made known to that company his said interpretation of its letter; that said company acquiesced in and consented to said interpretation of its instructions; that plaintiff thereupon acted upon such interpretation and faithfully carried out the instructions as so understood during the remainder of the cotton season of 1908-1909 and during those of 1909-1910 and 1910-1911, all of which was known and acquiesced in by the defendant during all that time, whereby it was estopped from claiming now, after plaintiff had incurred the obligations resulting from the Bremen awards for the season of 1910-1911, that the said letter of August 21, 1908, should have been given by Heye a different meaning and application; that plaintiff, by his authorized agent, signed the Sherman agreement of January 27, 1911, providing for arbitration at Liverpool and for settlement between the parties according to the awards to be made in such new arbitration, but that said agreement "proved to be impossible of performance in that it required the Liverpool arbitrators to arbitrate on the same grade and staple

descriptions that the cotton concerned in this suit were sold upon in the Bremen market, and in proceeding with their arbitrations to apply the differences that were actually made for C. I. F. and six per cent cotton on the Liverpool market by buyers from Birge-Forbes Company and other American shippers on the very dates of the Bremen sales concerned in this suit, whereas after said agreement was made the fact developed that on the dates in question there were no transactions at Liverpool in the grade and staples of cotton to which the arbitrators were limited and hence that no basis existed upon which the Liverpool arbitrators could proceed; and consequently the arbitrators refused to proceed with the arbitration;" that by reason of the non-existence (unknown to the parties) at the time said agreement was made of the basis or condition necessary to its operation, such agreement never became a legal contract, but was null and void and the Bremen awards still remaind in full force and effect; and that plaintiff, instead of preventing any arbitration at Liverpool as charged, did everything in his power to bring it about, and, not being at fault for the failure of the effort to arbitrate at Liverpool, was entitled to recover on the awards made at Bremen. (Record, 120-122).

"Said pleadings are lengthy, but the above is a correct and complete summary of them. It would be interesting to compare them with the pleadings in the present case and note the similarity of the issues made, but the counter-proposition now under discussion concerns only what was involved in and determined by the first suit.

"The oral charge of the court to the jury in said first suit was as follows:

"*Gentlemen*:

"The court has concluded, after hearing the argument of counsel in the cause, that it becomes my duty to direct a verdict. By so doing, of course I will relieve the jury of a very large amount of labor in going over the voluminous testimony and reaching such conclusion as you might

reach from investigating the facts. I take this action in the case because I believe the whole case turns on questions of law which are for the decision of the court. For that reason I feel that I should direct the character of verdict you return, indicating the amount you should find in the case. In doing so, it may not be improper to make a very brief statement of the character and nature of the suit.

"This case was filed by the plaintiff, Carl R. Heye, based upon the claim that he had paid out something over seventy-six thousand dollars, or had become liable for that sum of money, on account of certain findings of the Bremen Board of Arbitration of the Bremen Cotton Exchange in ascertaining the differences in the staple, grade and quantity of certain cotton sold by him as the agent of the defendant company on the Bremen market. He claims that he acted as the agent of the defendant company, and made sales of cotton between the 1st of October, 1910, and May 1, 1911. He alleges that it was agreed that the cotton he sold as the agent of the defendant company was to be sold under the rules of the Bremen Cotton Exchange, and, among those rules, was a stipulation that all differences as to grade and quality were to be arbitrated by the Board of Arbitrators provided for by the rules which have been introduced in evidence in this case. He claims that between the dates I have indicated, viz.: October 1, 1910, and May 1, 1911, something over fifteen thousand bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and after the sales were made, reclamations were made by those buyers, and disputes and controversies arose as to the quality, grade and staple of the cotton, and that those disputes and controversies, under the rules of the Bremen Cotton Exchange, were submitted to the Board of Arbitrators; that those arbitrators acted in accordance with the rules of the

Bremen Cotton Exchange and made their award; that thereafter that award was appealed from to the Board of Appeal, also provided for by the rules of the Bremen Cotton Exchange, and the Board of Appeal made its award, and that by virtue of these rules and these awards, he became liable to the buyers of the cotton in about the sum of $74,333.33. He alleges that, in addition to this item of award, he paid out on the cotton so sold for the defendant company the sum of $1730.16 for losses and deficiencies in the weight of the cotton. As far as the latter sum, $1730.16 is concerned, which the plaintiff alleges that he paid out for losses and deficiencies in the weight of the cotton, there is no controversy whatever in the testimony. The plaintiff alleges that he paid those amounts, and there is no testimony in behalf of the defendant company contradicting the evidence of the plaintiff on that point. Therefore, it would be my duty to instruct you to render a verdict for the plaintiff, Heye, for the sum of $1730.16, being the amount of losses and deficiencies in the weights of the cotton in controversy in this suit.

"As to the other part of the controversy, the defendant, Birge-Forbes Company, claims that it is not liable to the plaintiff for the amount of the awards for the reasons set out in its amended original answer filed in this case January 6, 1913. Without attempting to make an elaborate statement of the reasons set out in the answer the defense revolves around two propositions named in that answer. One of them is that the plaintiff, Heye, can not recover on the awards made by the Bremen Board of Arbitration, for the reason that on the 27th day of January, 1911, the findings of the Bremen Board of Arbitration were set aside and annulled by an agreement made between the parties to this suit on that date. The defendant alleges that it became dissatisfied with the findings of the Bremen Board of Arbitration, and that there were various negotiations between the defendant

company and the plaintiff, Carl R. Heye, prior to the 27th of January, 1911, which culminated on that date in the agreement which has been read in evidence, and which is attached as an exhibit to the answer of the defendant company, and the defendant company claims that agreement amounted in law to a setting aside and annulling of the findings of the Bremen Board of Arbitration.

"It is in evidence that the agreement of January 27, 1911, was never carried out. The arbitrators who were agreed upon in that agreement of January 27, 1911, refused to act because of the fact, as is alleged that they claimed that there was not sufficient data upon which they could reach a conclusion at Liverpool, the place where the arbitration provided for in the agreement was to occur.

"There was some testimony one way and the other as to whether the plaintiff or the defendant company was chargeable with the blame for not carrying out the agreement of the 27th of January, 1911, but I do not believe there is any testimony sufficient upon which to base a finding that either the plaintiff or the defendant company was at fault for failing to carry out that agreement. In other words, it was an agreement attempted to be made to arbitrate which was never executed, and this through no fault of either of them as the court believes from the testimony.

"The question for the court to decide is whether the agreement of January 27, 1911, amounted to an abandonment and annullment of the findings of the Board of Arbitration and the Appeal Board of Arbitration.

"The court has come to the conclusion in this case that the plaintiff's cause of action rests upon the finding of the Board of Arbitration provided for by the rules of the Bremen Cotton Exchange; that that finding by the Board of Arbitration constituted his cause of action. If the Bremen

Board of Arbitration had found nothing in favor of the parties to whom the cotton was sold, and who have claims for reclamation, then plaintiff would have nothing to pay and would have no cause of action against the defendant, so that the basis of this suit which constitutes his cause of action is that he had been compelled under the rules of the Bremen Cotton Exchange to pay out certain sums found against the defendant company by the Board of Arbitration of that Cotton Exchange.

"Now, when for any reason the agreement of January 27, 1911, failed to become operative, it remitted the plaintiff to his original cause of action which was the finding of the Bremen Board of Arbitration, and upon that he sues, and therefore the court is of opinion that the agreement of January 27, 1911, while it would have been effective, if it had been carried out, but not having been carried out, and without the fault of either party the plaintiff was remitted to his original cause of action, which is the finding of the Board of Arbitration of the Bremen Cotton Exchange.

"The other proposition that was raised was that the rules of the Bremen Cotton Exchange were modified by the instructions given by the defendant company on the 21st day of August, 1908, together with the reply thereto made by the plaintiff on the 14th of September, 1908, and that the record may be as complete as possible on this particular phase of the case, I call the attention of the jury to the statements contained in the letter which the defendant company wrote to the plaintiff on the 21st of August, 1908, and which letter I quote in full as follows:

"Replying to yours of the 3rd inst., as you seem to think, you will be able to do a large business for us, and as our relations have always been very pleasant, we will drop the question of reducing expenses by employing an agent for the

present, and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grade and staple will be those in effect (the actual differences made on cif and six cotton sold by us) at the time of the sale instead of the last day of landing.'

"The defendant company had the right to engraft that change on the rules of the Bremen Cotton Exchange so far as the liabilities and obligations of the plaintiff in this case were concerned, if the proposition in that letter matured into a contract—that is, if the minds of the parties met as to that particular phase which the defendant company sought to engraft on the rules of the Bremen Cotton Exchange; so that the court must look to the testimony in the record to determine whether the minds of the parties met and agreed upon any change of the rules of the Bremen Cotton Exchange. Now, the letter of the defendant company of August 21, 1908, reached the plaintiff, and on September 14, 1908, the plaintiff replied to it, and I now quote his reply:

" 'Thanking you for your favor of August 21, I am glad to note that you are willing to continue our agreeable relations and beg to assure you once more I always shall use all ability and activity to push business, and to make same as extensive and satisfactory as possible.

" 'I note you wish it to be understood that all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future. However, I find it necessary to mention I fear we often shall meet some objections as to this condition, for Bremen buyers principally wish to buy exactly on Bremen rules. They are hard to be had for any exceptions, nevertheless, I shall try and also in this point

do my best for you. If, however, later on the resp. conditions shall prove to hinder business, I shall let you know.'

"The statement which the plaintiff appears to acquiesce in and agree to be bound by is the statement contained in this letter that 'all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future.'

"It is conceded in the argument in the case by the attorneys on both sides that subsequent to the writing of the letter of September 14, 1908, the arbitrations buyers did demand were based on those grade and staple differences in force on the date of the sale, and therefore whatever there was in the proposition contained in the letter of August 21, 1908, by the defendant company, and the reply in the letter of September 14, 1908, by the plaintiff has been carried out and complied with in the transactions which occurred between the parties subsequent to that date, and there is nothing in the finding of the Bremen Board of Arbitration of the Bremen Cotton Exchange which contravened that particular phase which the defendant company proposed and which the plaintiff accepted. They went along subsequent to that time and arbitrated the differences under the rules of the Bremen Cotton Exchange, simply asking that one modification as contained in the request of the defendant company of August 21, 1908, and answered in the letter of plaintiff of September 14, 1908.

"This being so, the court is of opinion that the plaintiff in this case is entitled to recover not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of $85,000.00 being the total amount

of money which he paid and claims to be liable for, plus the seventeen hundred and some odd dollars which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money which he actually paid out on account of those contracts as such guarantor and surety.

"The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the Board of Arbitration of the Bremen Cotton Exchange, and which has been in evidence to you, is $36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of $1730.16 for deficiencies in weight, etc., of the cotton, and the further sum of $36,610.96 being the amount of the award of the Board of Arbitrators of the Bremen Cotton Exchange which the plaintiff has paid, and I have had prepared a verdict which I now read, and which some member of your body will sign as foreman.

"'We, the jury, under the direction of the court, find for the plaintiff in the sum of $1730.16 for deficiencies in weight, etc., of cotton, and the the further sum of $36,610.96 being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars.'" (Record, 127-135).

"The above charge of the trial court, with one paragraph added, became the opinion of this court on writ of error. (*Birge-Forbes Co. vs. Heye*, 212 Fed., 112).

A writ of certiorari was denied by the United States Supreme Court. (*Birge-Forbes Co. vs. Heye*, 234 U. S., 759, 58 L. Ed., 1580).

"The judgment in said first case was as follows:

"On this 19th day of May, 1913, this cause came on to be heard, and both parties appeared and announced ready for trial. Then came a jury of twelve lawful men, viz., H. H. Chestnutt and eleven others, who were duly impanelled and sworn to try the cause. After hearing the evidence and the arguments of counsel as to the law of the case, the court, on the 23rd day of May, 1913, directed a verdict, and thereupon the jury delivered in open court the following verdict, to-wit:

" 'We, the jury, under directions of the court, find for the plaintiff in the sum of seventeen hundred and thirty and 16/100 dollars for deficiencies in weight, etc., of cotton, and the further sum of thirty-six thousand, six hundred and ten and 96/100 dollars, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest per annum on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars. Sherman, Texas, May 23, 1913. H. H. Chestnutt, Foreman.'

"It is therefore considered and adjudged by the court, in pursuance of said verdict, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, the Birge-Forbes Company, a private corporation, the sum of forty-three thousand and eighty-two and 64/100 ($43,082.64) dollars, with interest thereon from this date at the rate of 6% per annum, said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid and as to which a cause of action in his favor against the defendant has already accrued.

It is further considered and adjudged by the court that plaintiff recover of defendant all costs of this suit, and that he have his execution for the enforcement of this judgment." (Record, 135-136).

"Following is that portion of the court's charge at the trial of the present suit that contains a discussion of the effect of the former judgment:

"*Gentlemen of the Jury*:

"At the conclusion of the evidence in this case, both the plaintiff and the defendant submitted motions asking for an instructed verdict, that is to say, the plaintiff submitted a motion asking me to instruct the jury to return a verdict in his favor for the amount of money claimed by him to be due him by the defendant, and the defendant company also submitted a motion asking me to instruct the jury to return a verdict in favor of it and against the plaintiff as to the entire amount sued for by the plaintiff. These motions were made orally, and after having submitted these motions, both sides have presented me, as liberally and as fully as they wished to, their arguments and reasons for making these two requests for an instructed verdict.

"It is the contention of the plaintiff that every issue in this case which goes to establish the liability of the defendant company to the plaintiff was adjudicated in a former trial between these parties which happened in the spring of 1913 in this court. The defendant company, in reply to that position, contends that none of the issues which go to the liability of the defendant company on the claims here sued for were adjudicated by that former judgment rendered in this court. It is the further contention of the defendant company that if they are wrong with reference to whether the liability of the defendant company to the plaintiff has been determined by the former adjudication of May, 1913, that under the laws which prevailed in the German Empire, the claim of the

plaintiff against the defendant is barred by the statute of limitation, because, at the time he claims to have made the payment of the sums of money represented by German marks on the 6th day of May, 1914, and at the time that he gave the notes which express this sum previous to the date of payment, that the claims of those who had reclamtions for cotton against the plaintiff, Heye, were barred under the statutes of the German Empire, and that therefore, when he paid the claims, it was a voluntary payment on his part, which was not binding on the defendant company.

"There is also, in the event I should determine the case in favor of the plaintiff, another contention as to what value should be given to a German mark in the ascertainment of the amount of the judgment to be rendered in dollars and cents, the plaintiff contending that the court has judicial knowledge of the fact that the German mark is worth 23 8/10c and the defendant company contending that at the date when this trial is occuring the value of the German mark has depreciated and is now worth only 18¼c.

"Of course, if the court should decide that the claims now presented for adjudication to the court, were not adjudicated in so far as the liability from the defendant company to the plaintiff is concerned, then under the state of facts existing here, I would be compelled to render a judgment for the defendant, and there would be no occasion for me to determine the proposition as to whether the value of a German mark is 23 8/10c or 18⅛c. Furthermore, if the court should become convinced under the statutes which have been offered in evidence as to the periods of prescription and limitation which prevail in the German Empire, that the claims of the parties in Germany who asserted reclamations against the plaintiff, Carl R. Heye, were barred when he gave the notes and paid the debt, then in that event, the defendant here would not be liable and there would

be no necessity for determining what is the value of the German mark in American coin, or ascertaining in any way what the equivalent of a German mark would be in dollars and cents.

"So you will observe from the statements made that these motions for instructed verdicts raise two vital issues. The first is as to whether the former judgment rendered in May, 1913, adjudicated the question of liability so far as the claims here sued on are concerned.

"The plaintiff has offered in evidence the pleadings, the charge of the court, the verdict of the jury, and the judgment that was rendered upon that verdict in this court on the 23rd day of May, 1913. These pleadings have been read, and it could serve no useful purpose to make a second incorporation of them in the record by reading them again, and I will therefore content myself with only alluding to them in a general way.

"These pleadings exhibit the fact that there was a former suit between these same parties growing out of the transactions that occurred between them beginning early in 1901 and running into 1911, and that that portion of the transactions which occurred between them with which this former suit concerned itself were those transactions between the parties occurring between Oct., 1910, and the 1st of May, 1911. It was alleged in the petition of the plaintiff in the suit which culminated in the judgment of the 23rd of May, 1913, that the defendant company had by a contract and agreement between itself and the plaintiff constituted the plaintiff its selling agent in Bremen, Germany, to sell for it certain shipments of cotton. It was alleged that during the period in which the contract existed between the parties some 15,000 bales of cotton were shipped by the defendant company to the plaintiff, Carl R. Heye, at Bremen, Germany, to be sold by him as the agent of defendant. It was alleged that these sales were by the agreement of the parties to be made ac-

cording to certain regulations existing on the Cotton Exchange in Bremen, and that among other features of those regulations it was provided that if there should be reclamations made by the German buyers from Carl R. Heye as the selling agent of the defendant company which grew out of any differences in the quality, grade and staple of the cotton sold by Carl R. Heye for the defendant company, that the ascertainment of the existence of such differences, as well as the ascertainment of the amount of money which such differences represented, was to be submitted to the Board of Arbitration of the Bremen Cotton Exchange. It was also alleged that growing out of these transactions from some time in Oct., 1910, to the 1st of May, 1911, the German buyers of the cotton shipped by the defendant company to the plaintiff Heye for sale by him as their agent, did make reclamations which amounted to $74,334.33, or 312,749.31 German marks, the latter amount being equivalent in German money to the former amount of American money. It was alleged that under the contract between these parties if either side should become dissatisfied with the finding of the Bremen Board of Arbitration of the Cotton Exchange at that place, that such party so dissatisfied should have the right of appeal to what is denominated as the Appeal Board, which Appeal Board has the power to pass upon the fairness and regularity of the arbitration made by the first board which I have mentioned as the Arbitration Board of the Bremen Cotton Exchange. It is alleged in the original suit in 1913 that an appeal was taken from the Arbitration Board which found that the buyers of the cotton in Germany which the defendant had shipped and sold through the plaintiff, Carl R. Heye, should be awarded 312,749.31 German marks as the amount to which they are entitled upon the failure of the cotton shipped by the defendant to reach the classifications, grade and staple which the contract pro-

vided should characterize it. It is alleged that the finding of that Board of Arbitration was appealed from and the Appeal Board affirmed the fairness and justice of the award of the Board of Arbitration. And the plaintiff thereupon alleges that under the contract and the sales made according to the regulations prevailing upon the Cotton Exchange in Bremen, he was entitled to recover back from the defendant the value of the money that he had paid to the buyers of the cotton in Germany who had made the reclamations.

"Now the defendant resisted that contention of the plaintiff in the suit of May, 1913. The defendant denied that the cotton was to be sold according to the circumstances which I have just detailed, and the defendant further asserted that the arbitrations were unfair and unjust and that the awards were excessive and exorbitant and not expressive of the true condition of the contract as made; that the cotton was what it was represented to be and that therefore they were not liable to the plaintiff. They further alleged that there were circumstances which were to be understood and certain things which were to be performed by the plaintiff as their agent in order to fairly present their side of the issue to the Board of Arbitration of the Bremen Cotton Exchange and the Board of Appeal, and that plaintiff failed to perform those things which the contract required of him, and which, if he had performed, would have shown in the particulars provided for in the rules of the Bremen Cotton Exchange that the cotton shipped by the defendant did come up to the contract under which it was shipped with regard to staple and character of fineness in every way, and, that plaintiff having failed to do his duty as the contract provided, and therefore having caused loss to the defendant, he ought not to be permitted to recover.

"It was further contended if there was an agreement that the cotton should be sold according to

the rules prevailing on the Bremen Cotton Exchange, and even if the arbitrations were as provided for in the rules, that subsequent to the finding of the Bremen Board, and the affirmance of it by the Appeal Board, the plaintiff, Carl R. Heye, and the defendant company entered into a new agreement to arbitrate by which under certain provisions in that agreement the arbitration was to occur in Liverpool, England, and that therefore the plaintiff was not entitled to recover in the suit of May, 1913, for the reason that this arbitration was the one on which he must base his claim rather than the arbitration made by the Bremen Board according to the rules of the Bremen Cotton Exchange. That suit went to trial with those issues involved. It appeared at the trial according to the allegations in the pleadings in that suit, as well as in the allegations in the pleadings here and the proof introduced on that trial, that the amount of $74,334.33 claimed by the plaintiff had not been paid. That he had only paid a portion of the amount and that he brought his suit upon the idea that he was obliged to pay the balance of the $74,334.33, and when that fact appeared in the trial the court directed the jury to find for the plaintiff in that first suit only the amount he had actually paid, and thereby in effect determined that in that suit, not having paid the balance of the amount, he would be entitled to recover only the amount he had paid. In other words, under the view of the case as taken by the court there, the plaintiff's right to recover the balance for which he sues at this time was practically an inchoate right and that the amount was not due according to the terms of the contract, and therefore plaintiff was not in a condition then, although he might have subsequently acquired the right to recover by having paid the balance of the money, to have his claim matured into a judgment. The court thereupon directed a verdict for the amount that judgment showed, which was the

whole amount claimed by the plaintiff in that suit, less what the evidence and pleadings showed the plaintiff Heye at that time had not paid to the holders of the reclamation claims.

"Now the plaintiff Heye has brought this second suit which the pleadings show is to recover the amount found by the Board of Arbitration of the Bremen Cotton Exchange in his favor, less what was recovered by him against the defendant company in the suit of May 23rd, 1913. So that, the proposition to be decided here is whether the effect of the former judgment is conclusive against the defendant company as to the legality of the claims now sued on and the liability of the defendant company to pay them to the plaintiff. Upon the showing in this suit by the plaintiff that subsequent to the rendition of that judgment he had paid in money to the reclamation holders the entire amount of the reclamation claims not paid at the time the former suit went to judgment, the question now is whether or not as before stated the former judgment is conclusive as to the right of the plaintiff to recover in this suit. Both parties have presented to me decisions of the highest court in the land upholding the contentions they have made, and my investigation of the authorities has convniced me that there is no difference between these gentlemen as far as the law is concerned. This case is like many cases that are presented in the court room where the lawyers do not differ as to the law, but the differences become as wide as the two poles as to the application of the law. That seems to be the situation here. Neither side disputes the fact that the law produced by their respective adversaries is the law if it can apply to the facts of this case. I have examined the two decisions in the 94th volume of the U. S. Supreme Court Reports to which my attention was called in the argument, and I find that in Cyc the same propositions covered by those two decisions are stated very succinctly and clear-

ly and I believe by referring to them I can make my view of the law more understandable than by reading excerpts from the two cases in 94 U. S. I have on my desk the 23rd volume of Cyc which contains a very exhaustive article on the subject of judgments with a citation of authorities sustaining the text supplied by the writer of the article. At page 1215 I find this language:

"'A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and can not be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action.'

"The next subdivision draws the distinction between the conclusiveness of a judgment and a bar created by the former recovery and uses this language:

"'A former judgment between the same parties is a bar to the maintenance of the second action only when the causes of action in the two suits are identical. But it will be conclusive and final as to any issue litigated and determined in the former suit, and coming in question in the second suit, although the latter is brought upon an entirely different cause of action.'

"Now I do not want to let pass out of my mind a proposition I think I am confronted with and that is to decide whether the liability of the defendant company to the plaintiff was adjudicated by the judgment of May 23rd, 1913, in so far as the finding of the Board of Arbitration of the Bremen Cotton Exchange is concerned. That is, whether that judgment, which was duly appealed from and affirmed by the Circuit Court of Appeals, determined the question as between these parties of

the liability of the defendant company to the plaintiff for the amounts for which reclamation claims were made by the German buyers; in other words, whether the liability of the defendant company to the plaintiff was ascertained and decided by the finding of the Bremen Board with respect to the cotton shipped during the season of 1910-1911, beginning some time in Oct., 1910, and ending May 1st, 1911, and whether the former judgment found that to be conclusive. As stated, the former case involved clearly under the pleadings whether the finding of the Bremen Board of Arbitration of Cotton Exchange was a binding finding as between the reclamation holders of claims and Carl R. Heye for which under the terms of the contract the defendant company was liable to the plaintiff. That issue was litigated, the plaintiff asserting in that case which matured into the judgment of May 23rd, 1913, that the finding of the Bremen Board was an arbitration by agreement which established the fact that the claims were valid and the amount which should be paid, the defendant company contending that the finding was invalid because unfairly made, and because the findings were excessive and exorbitant and because the plaintiff in those litigations before that board had not fairly represented the defendant company, and because subsequent to the finding of the board they had agreed upon a new arbitration. All these issues were presented in the original suit and determined adversely to the defendant company here.

"I call attention to one other passage on the subject which I have been discussing which appears on page 1298 of Cyc. I find this language:

" 'Identity of the subject matter is not the true test to determine whether a judgment in one action is conclusive in another, although some of the cases have stated this as a general rule. It is undoubtedly true that a judgment is evidence in a second action between the same parties or their

privies concerning the same subject matter as to all questions litigated and decided; that a former judgment can not operate as a bar to a second suit unless it concerns the same subject matter and is upon the same cause of action, and that the estoppel of a judgment, whatever may be its extent as between the parties, is confined, as to their privies, to the particular subject of the litigation. But still it is a well settled rule that the judgment of a court of competent jurisdiction on a question directly involved in the suit is conclusive in a second suit between the same parties, where the same question comes again in issue, although the second action relates to a different subject matter. Thus the former judgment will be an estoppel where the same question or issue, depending on the same transaction or state of facts, arises also in the second suit, although in relation to different right or different property, but not where the question in the second suit, although similar to that in the first, grows out of a different transaction or state of facts, nor where the second action, although relating to the same subject matter, is between different parties, or grows out of the same subject matter, but involves a different question or claim in regard to it.'

"Furthermore:

" 'The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not. Or as the rule is otherwise stated, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied, it must

clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first.'

"Then skipping a paragraph, I find this rule given:

" 'The general rule is that a judgment is conclusive for the purposes of a second action between the same parties or their privies, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action.'

"Now I think the distinction made by the text there is clear and can be easily ascertained as to how it should be applied in this case. There is no doubt but that in the first case which went to judgment on the 23rd of May, 1913, the plaintiff here, who was the plaintiff there, sought to recover from the defendant for the very claims which he seeks to recover now and that the result of the trial which failed to give him the recovery he seeks in this suit was occasioned because of the fact that he had not paid at that time the claims now sued on and which were presented in that trial, and which have subsequent to that judgment been paid. So that the vital issue was decided in the first trial—that is that the defendant was liable to the plaintiff under the contract between them for all reclamation claims found by the Board of Arbitration of the Bremen Cotton Exchange for cotton sold by plaintiff as agent of defendant, that is, the finding of the Bremen Board established the validity of the claims. But I held in the former trial that Heye could not recover from the defendant company then simply because he was liable to pay the reclamation claim holders; that his right to recover must be limited to the amount he had actually paid to the claim holders, and that was why the judgment was ren-

dered for the sum it was and not for the full amount sued for.

"Now in this case I think the pleadings and evidence establish the fact that this is a suit to recover on the part of the same plaintiff from the same defendant company the amount of reclamation claims Heye had not paid when the first suit went to judgment and which he has since paid. That can be very plainly established in my mind from an inspection of the testimony in the record and that portion of it upon which there is no dispute. Certain interrogatories were propounded to the plaintiff by his counsel and among them was interrogatory 2nd which reads as follows:

" 'Referring to the arbitration allowances made against the Birge-Forbes Company in favor of certain European buyers on account of cotton sold them at Bremen through you as selling agent during the cotton season of 1910-1911, and referring to the first suit brought by you against the Birge-Forbes Company based upon said claims, which suit went to judgment in this court on May 23rd, 1913, please state whether or not you ever paid to the European purchasers the remaining sums due them that you had not actually paid at the time of the trial of said first suit.'

"This interrogatory very plainly asked him whether since the judgment of May 23rd, 1913, he had completed the payment of the claims held by the reclamation claim holders growing out of the failure of the cotton shipped to come up in quality, grade and staple to what it was represented to be. His answer is as follows:

" 'In answer to interrogatory II the witness says: I state that I paid to the European purchasers of the Birge-Forbes Company's shipments during the cotton season of 1910-1911, all remaining sums still due them when judgment was given in my favor for the first part of this suit on May 23rd, 1913.'

"The answer to the next interrogatory sets out the parties to whom payments were made.

"The deposition of the witness, Oscar Polletin, discloses the fact that he held what was called a power of attorney from the plaintiff, Carl R. Heye. The scope of his power does not appear in the evidence. I think it must have been something like General Manager of the business of Heye. He sets out exhibits from the books of the plaintiff, Carl R. Heye, which show that those payments were made and that they were made first by giving Heye's notes to the holders of the claims and afterwards the notes were taken up by the payment of cash by Carl R. Heye to those holders, and that this was done on the 6th of May, 1914. So that I feel like under the state of the law as the court conceives it to be as applied to the evidence in this case that the liability of the defendant company on the claims sued for here was adjudicated in the former judgment between these same parties in this court which judgment was rendered on the 23rd of May, 1913." (Record, 166-180).

AUTHORITIES.

Railway Co. vs. United States, 168 U. S. 1, 42 L. Ed., 355.
New Orleans vs. Bank, 167, U. S. 371, 42 L. Ed., 202.
Mason Lumber Co. vs. Buchtel, 101 U. S. 638, 25 L. Ed. 1072.
Johnson Co. vs. Wharton, 152 U. S., 253, 38 L. Ed. 430.
Mining Co. vs. Mining Co., 157 U. S. 683, 39 L. Ed., 859.
Town of Beloit vs. Morgan, 7 Wall. 619, 19 L. Ed., 205.
Hanrick vs. Gurley, 93 Tex., 458.
Webster vs. Mann, 56 Tex., 119.
23 Cyc., 1288, 1294, 1295, 1306, 1322.

Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316, 40 L. Ed., 712.
Harshman vs. Knox County, 122 U. S., 306, 30 L. Ed., 1152.
Life Insurance Co. vs. Bangs, 103 U. S., 780, 26 L. Ed., 608.
Railway Co. vs. Fraloff, 100 U. S., 24, 25 L. Ed., 531.
2 Foster on Federal Practice (5th Ed.), p. 1556.

ARGUMENT.

The verdict and judgment at the first trial between these parties established the complete validity of the Bremen awards as a whole, and the fact that such awards bound the Birge-Forbes Company as principal and Heye as guarantor to pay the sums they called for, whatever such sums might be. It is immaterial whether we say that said verdict and judgment found the aggregate amount of the awards to be $74,820.52, though in fact that was the undisputed amount. The main and important fact is that the verdict and judgment adjudged the awards to be valid in their entirety, and without distinction between different awards or different portions of the same award, and then at the last trial plaintiff proved conclusively what sum said awards amounted to and that since the other trial he had finished paying them off.

In *Ry. Co. vs. U. S.*, 168 U. S. 1, it was decided that a judgment holding certain railroad maps required to be made under a grant from the Government to be sufficient and valid was binding upon that question in another suit between the same parties concerning land not involved in the first suit but dependent for its title upon the same maps. We beg to quote from the opinion the following excellent discussion of the doctrine of *res adjudicata*:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery,

cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

* * * * * * * * * * * *

"The latest expressions of opinion by this court on this question are in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S., 683, 691, (39:859, 863), and *New Orleans vs. Citizens' Bank*, 167 U. S., 371, 396. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the boundaries of certain mining claims, alleged to have been legally located and to belong to the former company, precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located—the court observing that a judgment by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest, the essence of estoppel

by judgment being that 'there has been a judicial determination of a fact, and the question always is, Has there been such a determination? and not, Upon what evidence or by what means was it reached?'

"In *New Orleans vs. Citizens' Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue duly raised by the pleadings whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: 'The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies.' "

"In 23 Cyc., 1288, we find this language:

"A judgment rendered by a court having jurisdiction of the parties and subject matter, whether correct or not, is conclusive and indisputable evidence as to all the points or questions in issue in the suit and actually adjudicated therein, when the same comes again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action, in so far as it settles and determines questions of fact as distinguished from abstract propositions of law."

"We quote from P. 1294 of the same book:

"A decision adjuging a conveyance, contract, or other instrument to be fraudulent or invalid is conclusive of that fact in all further litigation between the same parties; and on the other hand, a judgment giving effect to a deed, mortgage, judgment,

or contract is conclusive evidence that it is free from fraud or illegality, even though that issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of action was valid and enforceable, except where the party objecting was ignorant of the fraud or illegality before the judgment, or was prevented from pleading it."

"The same author says, at p. 1295:

"Where a series of actions are brought for installments due under a contract, or successive actions on a continuing or recurring cause, an adjudication in the first action on the fundamental state of facts on which they all rest will be conclusive in the rest, precluding inquiry into such ultimate facts or grounds of recovery."

"The 'fundamental state of facts' on which both of Heye's suits rested was that the Bremen awards were free from illegality, unfairness and all the other infirmities with which they were charged and were valid and binding upon the parties. The first judgment was impossible without a finding to that effect. Hence in the present suit the defendant is precluded from making inquiry into such "ultimate fact and ground of recovery."

"Again we quote from 23 Cyc., p. 1306:

"Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estoppel as if they were specifically found in so many words; or, in other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain premises, the

premises are equally *res adjudicata* with the conclusion itself."

"If 'it is allowable to reason back from the judgment to the basis on which it stands," it is impossible to escape the conclusion that the Bremen awards were all valid.

"Also in 23 Cyc., p. 1322, the following language is used:

> "When the validity of a contract is adjudicated in an action upon it, either in the sense of being necessarily determined by a judgment enforcing the contract, or by being put in issue and tried, the question is conclusively settled by the judgment, for the purposes of all further litigation between the parties, as in actions for further installments due under the contract; and conversely if the contract is once adjudged invalid it cannot be sustained in a second action between the same parties."

"In *Town of Beloit vs. Morgan*, 7 Wall., 61, the holder of certain bonds of the town had recovered judgment on them and afterwards the town brought a bill in equity against him to enjoin him from suing upon, and to require him to surrender up for cancellation, other bonds issued under the same statute and for the same purpose. The Supreme Court held that the validity of all the bonds had been conclusively established by the former judgment and could not be again questioned in any form. Note the following excerpt from the opinion:

> "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here

by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself may be different.

"An apt illustration of this principle is found in *Gardner vs. Buckbee*, 3 Cow., 120. Gardner bought a vessel from Buckbee, and gave two notes for the purchase money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as defense, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchaud v. Dias*, 3 Den., 238; *Doty vs. Brown*, 4 N. Y., 71, and *Babcock vs. Camp*, 12 Ohio St., 11, are to the same effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. (Cites several authorities). But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented.

"In *Henderson v. Henderson*, 1 Hare, 115, the Vice-Chancellor said: 'In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they

have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. *Brandernagle vs. Cocks*, 19 Wend., 207. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things."

"In *Harshman vs. Knox County*, 122 U. S., 306, the court quoted with approval the following language from *Burlen vs. Shannon*, 99 Mass., 200:

"The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded."

"In the case of *Insurance Co. vs. Bangs*, 203 U. S., 780, a judgment had been recovered upon two life insurance policies in an action at law, and thereafter the insurance company brought a bill in equity to enjoin the enforcement of said judgment and to cancel the policies because of an alleged conspiracy to rob the insurance company and of suicide by the assured in pursuance of such conspiracy. These were matters that could have been urged in defense of the suit at law, and the court held that the complainant in the bill was estopped by the former adjudication. In the opinion the court said:

"Aside from this, the judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in pro-

curing them, subsequently carried into execution, would have been a good defense. It was in fact originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action."

"Applying the above decision in the instant case, the first recovery by Heye is an answer to all future assertions of the invalidity of the Bremen awards, because all defenses presented in the last suit were either urged in the first suit or were available then and should have been urged.

In *Webster vs. Mann*, 56 Tex., 119, it was decided that a deed held valid in one suit could not be questioned in a second suit between the same parties or their privies, involving the title to town lots not included in the first suit but conveyed by the same deed. The Supreme Court of Texas, by Judge Stayton, said:

"The validity of that deed, in any event, was in issue in the case between the appellants and Baker as to lot 12; in fact, that was the main issue in the case; hence, even if Mann's title to lots 8, 9, 10 and 11 was not actually passed upon by the jury, the judgment rendered would be as conclusive of his right to that property as if it had been so passed upon; for there is no question that in so far as lot 12 was concerned, title to it, through the deed of Betsy Webster to Baker, was directly in issue. This issue depended solely upon the question of the validity of the deed, and that having been found in favor of the appellees, must be held conclusive as to all the property that passed thereby, or which

by its terms purported to pass thereby, and such judgment must, unless reversed or in some manner set aside, operate as a conclusive bar to any claim by Betsy Webster's heirs for any of the property named in the deed. *San Antonio v. Lewis*, 32 Tex., 411; *Lewis vs. San Antonio*, 26 Tex., 319; *Aurora v. West*, 7 Wall., 97; *Beloit v. Morgan*, 7 Wall., 619."

"That the pleadings, charge, and other parts of the record in the first suit between Heye and the Birge-Forbes Co. could be looked to for the purpose of ascertaining what was involved in and determined by the adjudication is settled by numerous decisions of the U. S. Supreme Court. An illustration of this rule is found in the case of *Washington Gas Light Co. vs. Dist. of Columbia*, 161 U. S., 316, wherein it was said:

> "The elementary rule is that, for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

"Furthermore, the trial court's finding in the present case that the validity of the Bremen awards in their entirety was an issue in the first suit and conclusively determined therein seems to be a finding on a mixed matter of law and fact and therefore not reviewable in this court on writ of error unless it is clear to this court that such finding is wholly without support in the record. The case of *Railway Co. v. Fraloff*, 100 U. S., 24, involved a dispute as to whether certain articles belonging to a passenger really constituted baggage as claimed. Note the following excerpts from the opinion:

> "Whether they were such articles, in quantity and value, as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact

for the jury, under proper guidance from the court as to the law governing such cases."

"No error of law appearing upon the record, this court cannot reverse the judgment, because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influences or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict and overruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

"In this connection it should be remembered that at the trial of the present case both sides moved for a directed verdict (Court's Charge, Record, p. 166) and did not ask that any issue of fact be sent to the jury, thereby consenting for the court to determine the questions of fact and thereby authorizing us to substitute "trial court" for "jury" in the above quotations from *Railway Co. v. Fraloff.* See 2 *Foster on Federal Practice* (5th Ed.), p. 1556, where the author says:

"When both parties move for a direction of a verdict, that is a submission of the facts to the court for decision and its finding is conclusive; unless there is no evidence as to a fact essential to support the judgment, but not where a party moved in the alternative either for a verdict in his favor, or, in case that were denied, that he might have leave to go to the jury. After such a motion has

been decided, it is too late for the unsuccessful party whose motion for a direction has been denied to ask leave to go to the jury."

"We have carefully read the decisions cited and discussed by plaintiff in error under the first proposition in its brief, and in our judgment none of them gives any support to plaintiff in error's position in this case.

"*Russell vs. Place*, 94 U. S., 606, is merely an illustration of the familiar rule that, where there are two counts in a declaration or two distinct grounds of recovery alleged, either one of which is sufficient to support the relief sought, and a recovery is had, such recovery does not operate as an estoppel in subsequent litigation when it does not appear from the record of the former judgment or otherwise that the recovery was based upon both grounds, or, if upon one only, which one. In *Russell v. Place*, the former recovery was had in an action for damages for infringement of a patent, which had two claims, both of which were pleaded. The judgment was general and failed to show that both claims were established and also failed to show which one was established. Neither was the matter made definite by proof at the subsequent trial in which this judgment was relied upon as an estoppel. No further comment is necessary to show the broad distinction between that case and the one now before the court.

"*Langdon vs. Clark*, 221 Fed., 841, is cited by plaintiff in error, but we could scarcely wish for a better authority in support of our position, as will appear from the following quotation from p. 847:

"Certainly it cannot be claimed that any of the several findings as to the title made by the trial court in the former action, other than that relating to the title to the tract of 8.7 acres, was necessary to the decision of the question involved. A judgment could have been rendered and the bill dismissed, without reference to whether or not title as to the other portions of the lake was or was not in the defendant in that action. If, however, the record disclosed that title to the tract of 8.7 acres had been derived from the same common source,

and had been dependent upon the existence or non-existence of the same fact or facts as the title to the remaining tracts, then the finding as to the title to the tract of 8.7 acres would have been conclusive as to the whole. See *Southern Pacific Railroad v. United States*, 168 U. S., 1; 54 Sup. Ct., 18, 42 L. Ed., 355 (1897). But the title to the 8.7 acres evidently involved a question distinct from that involved as to other portions of the defendant's land."

"The cases of *In Re. Wm. S. Butler & Co.*, 270 Fed., 705, and *Smith vs. Mosier*, 169 Fed., 430, are in our opinion, so learly irrevelant that comment is unnecessary.

An inspection of Exhibits A and B attached to Heye's petition in the trial court, and printed on pages 11 to 17 of the Record sent up to the Circuit Court of Appeals, and an inspection of Exhibit C. C. attached to the depositions of Oscar Polletin and printed on the sheet between pages 94 and 95 of said Record, will show that, with the exception of awards to a small amount made in favor of Lesser & Co. and C. A. Cruner & Co., which appear to have been completely extinguished by the payments made by Heye before judgment was had in his first suit against the Birge-Forbes Co., every award recovered on in the first suit was also recovered on in the present suit. In other words, with the two exceptions noted, the payments by virtue of which Heye obtained his first recovery were partial payments and were spread over all the awards without extinguishing any of them; and the balances due on the same identical awards remained unsatisfied until May 6th, 1914, when Heye made his final payment, the one on which the present judgment is based. Thus it conclusively appears that every award recovered upon in the present suit was adjudged valid and made the basis of a part of the recovery in the other suit.

QUESTION (d).

In answer to petitioner's contention that Heye's suit was barred by limitation, we beg to quote another excerpt from the brief hereinbefore referred to:

"COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S SIXTH PROPOSITION.

The court was well warranted in finding that the reclamation claims, which, when established by arbitration at Bremen, Heye became liable for as guarantor and afterwards paid, were not barred by limitation at the time he paid them; and, moreover, such finding involved a matter of fact not reviewable on writ of error from this court.

STATEMENT.

"The only allegations made by the defendant in the way of a plea of limitation, or on the subject of limitation, were as follows:

> "Even if it were true that said transaction was intended as a payment of any demands against the defendant, which is not admitted but expressly denied, then the same was entirely voluntary on the part of the plaintiff because if said parties had any cause of action whatever against this defendant, which is not admitted, the same were barred by two years statute of limitation when paid by plaintiff, if said scheme can be said to be a payment, more than two years having expired after the accrual of their various causes of action before the alleged payment was made." (Record, pp. 35-36).

> "Defendant further avers that if it is true that plaintiff has made the payments alleged, which it expressly denies, he made the same voluntarily, and not because he was bound therefor as guarantor or surety of defendant. Both plaintiff and each and all of said buyers, or persons to whom he claims he made such payments, reside in Germany, and under the laws of Germany, which defendant here pleads, each and all of said alleged claims and alleged awards were barred by limitation two years after the making of such awards, and that if the plaintiff has made such payments, as he alleges, he made the same long after the expiration of two

years and at a time when the same were barred by limitation under the laws of Germany against both the plaintiff and against this defendant, and when he was under no legal obligation to make the same." (Record, p. 38).

"Geo. C. Butte, a professor of law in the University of Texas, who had studied law in the universities of Berlin and Heidelberg a few years ago, but had never been a practitioner in Germany, was called as a witness by the defendant in an effort to establish its limitation plea. He produced a copy of the German Civil Code, printed in German, and read from it Sec. 477, translating the same into English as follows:

"The claim of the buyer for recission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is out-lawed in so far as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from the delivery of the goods; in the case of real estate in one year from the transfer of possession. This limitation period can be extended by agreement." (Record, pp. 145-146).

"It was his opinion that this provision applied under the circumstances of this case, and that the claims of the Bremen buyers of the Birge-Forbes cotton were outlawed in six months from the dates of the delivery of the cotton. On cross-examination, he said:

"There is no provision in the German code in regard to the period of limitation in case claims have been adjudicated by arbitration by a board such as the Bremen Cotton Exchange." (Record, p. 147).

"In another part of his cross-examination he changed his testimony as to when limitation would begin to run by saying it would begin from the first day of January next following delivery of the cotton. This is his language on that point:

"The statute says that the limitation period is six months from the delivery of the goods and that has been construed to mean from the first of January next following. That is a matter of construction." (Record, p. 149).

"On the question as to what sort of acknowledgement or new promise was necessary under the law of Germany to arrest the running of limitation, he said:

"A written acknowledgement of a debt, if the contract is such as must be in writing, or oral, if the contract is such as may be maide in parol, would suspend the running of the statute. Where the contract is in writing or where the contract is required to be in writing the acknowledgement of the debt must be in writing. Whether the contract is in writing or oral, if it is one that might be made orally and still be valid under the law, then an oral acknowledgement is good to control the statute of limitation." (Record, pp. 149-150).

"But Sec. 208 of the German Civil Code (the following translation of which Prof. Butte agreed was correct) reads:

"Prescription is interrupted if the obligor acknowledges the claim toward the obligee by part payment, payment of interest, giving of security, or in any other manner." (Record, p. 157).

"After the attorneys had finished with the witness, the court examined him as follows:

Question by the court:

"Now if one party sells to another party personal property and guarantees or represents it to be of certain quality, and under certain conditions, and the buyer on receipt of the property from the seller discovers that it is inferior in grade and quality, that, under our system, would give to the buyer a cause of action which we sometimes denominate as an action for unliquidated damages. Do they have any similar action of that kind in Germany?"

Answer:

"No, sir; the buyer has the remedies I have indicated. They do not in Germany have actions of that kind for unliquidated damages."

Question by the court:

"Suppose the parties to the transaction for the purchase and sale of personal property, realizing that there may be differences of opinion between them as to whether the property sold by the seller to the buyer comes up to and fulfills the warranties given by the seller to the buyer, realizing that there may be differences upon that subject, they have agreed between themselves that they will constitute a certain number of men, I don't care what you call them, but a certain designated number of men they agree to constitute the proper persons to be clothed with the authority as between the buyer and seller to estimate, determine and fix by their judgment—and I mean by judgment as distinguished from the judgment of a court—their opinion, the real amount of money which represents the difference between what the seller sold the buyer and what was delivered to the buyer under the contract and that body ascertains that amount, now then under those circumstances, when does limitation begin to run, from the time the goods were received by the buyer or from the time the duly constituted tribunal fixes the liability?"

Answer:

"It does not change the running of the statute. There is a special provision in the law that the buyer may accept the goods knowing of the defect and he has the same remedies as if he did not know of the defect at the time he accepted the goods, provided he makes a reservation that he accepts them subject to reclamation for the defect. I take the agreement as equivalent to a reservation between the parties at the time or the acceptance of the goods."

Question by the court:

"The parties have agreed that certain individuals, three or more, shall hear the statements from both sides and determine how much money it takes to express the failure of the goods to reach the warranty under which the seller sold, when does the limitation begin to run, from the time when the goods were sold, or the time when the parties through their duly constituted authority received the information as to the amount of money which would represent the failure of the goods to come up to the representations and warranties?"

Answer:

"It would run from the time of the delivery of the goods."

Question by the court:

"Suppose these appraisers whom the parties have agreed upon to investigate the matter and determine how much damage was occasioned to the buyer by the failure of the seller to send goods corresponding to his warranties should be engaged in their deliberations longer than six months, would the claim be barred?"

Answer:

"Yes, sir; because their finding is merely a finding of fact. It creates no additional liability between the parties beyond that which grows out of the contract of sale. These appraising commissions are very common in Germany. The appraisers are experts and their findings are not to be taken as arbitral awards but findings of fact binding on the parties. The party who feels himself aggrieved in a transaction of that kind must see to it that the finding of the appraisers is made within the period of six months, so that in the event the other party fails to pay what the appraisers find to be due, he must bring his

suit within six months, and then the finding of fact of the appraisers can not be challenged." (Record, pp. 150-152).

"Plaintiff introduced the following sections of the German Civil Code:

"195. The regular period of prescription is 30 years."

"202. Prescription is suspended so long as the performance is stayed or the obligor is temporarily entitled on any other ground to refuse performance. This provision does not apply to the pleas of right of lien, or unperformed contract, of absense of security or of *beneficium excussionis*, nor to the pleas available to a surety as provided for by 770 and to an heir as provided for by 2014, 2015."

"208. Prescription is interrupted if the obligor acknowledges the claim toward the obligee by part payment, payment of interest, giving of security, or in any other manner."

"218. A claim established by a non-appealable judgment is barred by prescription in 30 years even if it is itself subject to a shorter period of prescription. The same rule applies to a claim arising from an executory compromise or an executory deed, and a claim becoming executory to settlement in bankruptcy proceedings. Insofar as the settlement relates to periodical payments becoming due only in the future the shorter period of prescription is sufficient."

"220. If a claim is required to be enforced before a court of arbitration or a special tribunal, before an administrative court or an administrative authority, the provisions of 209 to 213, 215, 216, 218, 219 apply *mutadis mutandis*. If the arbitrators are not nominated in the agreement as to arbitration, or if an arbitrator is necessary for any other reason, or if the court of arbitration can not be invoked until after the fulfillment of some other condition, the prescription is already inter-

rupted by the obligee taking the steps necessary on his part for the settlement of the matters." (Record, pp. 157-158).

"Plaintiff moved the court to strike out and exclude the testimony of the witness, George C. Butte, concerning said sec. 477, and the alleged six months period of limitation, on the ground that there was a fatal variance between defendant's allegations and its evidence on the subject of limitation, in that the statute pleaded would outlaw the claim at the end of two years from the date of the arbitration award, whereas the statute proved would (if applicable at all) outlaw the claim at the end of six months from the date of delivery of the cotton, or else at the end of six months from January 1st next after such delivery (the witness having stated it both ways). The court took this notion under advisement, but did not find it necessary to act upon it. (Record, p. 156).

"All that part of the court's charge that dealt with the limitation question is here quoted in full:

"That leaves another question in the case which is the question of limitation. That is as to whether under the laws that prevailed in the German Empire this claim of the plaintiff, Carl R. Heye, can be enforced against the defendant company here. Or, to state the matter a little more literally, the question is whether when Heye paid to the German buyers their reclamation claims those claims as to Heye were barred, or as to the defendant company were barred by the statutes of limitation that prevailed in the German Empire. In other words, it is the contention of the defendant that when Heye made the payments to the reclamation claim holders, he was under no legal obligation to do so however great his moral obligation may have been, and that the payments were made voluntarily and therefore created no obligation on the defendant company to reimburse him. My attention has been called on this proposition to some sections of a book, which has been

admitted to be correct, translating certain parts of the prescription or limitation laws of Germany. In order that the book may be identified, I will state in this connection that it calls itself 'The German Civil Code' and purports to have been translated and annotated by a Mr. Wang. My attention has been called to Section 477 of this German Civil Code which reads as follows:

> " 'The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defects, in the case of movables in six months after delivery; in the case of land in one year after the transfer. The period of prescription may be extended by contract.'

"Now, in my opinion, if this suit had been brought without any of the circumstances which surrounded the transaction between the parties, Section 477 of the German Civil Code would have barred the holders of the reclamation claims from obtaining anything on account of the failure of the cotton purchased by them to come up to the contract representations as to quality, grade and staple. I think it is manifest that the enactment of this statute was intended to permit a speedy adjustment of those claims where there was a failure of an article sold by one person to another in Germany to come up to the promised quality of the article so sold; that is, while the matter is fresh in their minds and while the controversy is new, if it is then decided, it will be more apt to be a proper and just ascertainment than if delayed. Therefore, I am convinced under ordinary circumstances that if these reclamation claim holders had undertaken to establish their claims more than six months after the delivery of the cotton, section 477 would have defeated a recovery if applied. That is not the situation here. These people had in advance some idea that there

would be differences in judgment as to whether the cotton sold would come up to the cotton contracted for in quality, grade and staple, and they entered into an agreement which, as far as I am able to say, they had a right to enter into committing the decision of that matter to the Board of Arbitration of the Bremen Cotton Exchange. They both signed it and agreed to it, and for a long period of years all their transactions were regulated by it. It seems that no controversy arose between them until the end of the cotton season of 1910-1911. If prior to the controversy in this suit a dispute had arisen between them this record fails to disclose it. Then this controversy came up in which the findings of the Board of Arbitration of the Bremen Cotton Exchange were objected to. An appeal was taken from the finding of that board and the finding of the board was affirmed. So that, when the Board of Arbitration of the Bremen Cotton Exchange found that the cotton sold by the Birge-Forbes Company to the German buyers through their agent, Carl R. Heye, failed to correspond in quality, grade and staple to the cotton bought by these buyers, and found that a certain amount of money should be paid by Heye, acting in the sale as the agent of the defendant company and those findings of the board were affirmed by the Board of Appeals, then it was no longer, in the judgment of the court, a claim for compensation on account of the absence of promised quality in the thing sold, but became like any other claim, an ascertained and determined demand, fixed in its amount and absolute in its obligation. And therefore the court is of the opinion that under these circumstances the six months statute does not apply and the court is of the further opinion that the claim of the plaintiff is not barred by any statute of limitation, and that plaintiff has a right to recover, and it is my duty to direct a verdict in favor of the plaintiff." (Record, pp. 180-183).

AUTHORITIES.

Dainese vs. Hale, 91 U. S., 13; 23 L. Ed., 190.
Hudson River Pulp & Paper Co. vs. Warner & Co., (C. C. A.), 99 Fed., 187.
Eastern Bldg. & Loan Ass'n vs. Ebaugh, 185 U. S., 114; 46 L. Ed., 830.
Coran vs. Davis (Mass.), 103 N. E., 1027.
4 Corp. Jur., pp. 644-647, 843-844.
Railway Co. vs. Phillips (C. C. A.), 196 Fed., 328.
Railway Co. vs. Fraloff, 100 U. S., 24; 25 L. Ed., 531.
2 Foster on Federal Practice (5th Ed.), p. 1556.
2 Jones on Evidence, sec. 390-391.
3 Bouvier's Law Dictionary, 3325.
Sena vs. American Turquoise Co., 220 U. S., 479; 55 L. Ed., 559.
Melton vs. Trust Co., (C. C. A.), 190 Fed., 126.

ARGUMENT.

"Of course, the burden of proof was upon the defendant to establish its plea of limitation. And on writ of error the presumptions are in favor of the correctness of what was done by the trial court.

"The court might well have stricken out the defendant's evidence on the subject of limitation, because it was utterly at variance with the allegations. Having pleaded only a statute of Germany that would outlaw the claim in two years from the date of the arbitration awards, defendant offered no evidence whatever tending to support that allegation, but attempted to prove there was a German statute which would outlaw the claim in six months after the delivery of the cotton. Can a more striking contrast between allegations and evidence be imagined? See in this connection *Ware vs. Shafer*, 88 Tex., 44; 29 S. W., 756; *Railway Co. vs. Poole*, 104 Tex., 36; 133 S. W.; *Ennis vs. Cooke*, 2 Tex., 592. In the first named case the court said:

> "The object of pleading is to notify the opposite party of what it is expected to prove as the

ground of plaintiff's action, or the defendant's defense, so that he may prepare for the trial of the issues thus tendered. *Lemmon vs. Hanley*, 28 Tex., 220). To determine whether or not a pleading presents a certain issue, it is a safe rule to look at the pleading from the standpoint of the party against whom it is exhibited, and ascertain if the allegations are sufficient to notify him that the evidence offered will be produced, or that he will be called upon to present evidence to meet it."

"It is familiar law that appellate courts (even where they possess the right to review findings of fact) will defer greatly to the opinion of a jury or trial court on such matters because of the latter's superior opportunities to "size up" the witnesses and give their testimony such weight, and only such weight, as it may be justly entitled to. And of course this rule applies to expert witnesses the same as to others. Indeed it has often been remarked by the courts that expert testimony is to be received with caution and subjected to close scrutiny. (2 *Jones on Evidence*, sec. 390-391).

"Without desiring to criticise unduly the testimony of Prof. Butte, we nevertheless feel that the court was fully justified in practically rejecting his aid in interpreting the limitation laws of Germany.

"Prof. Butte first said there was a provision in the German Code prescribing a limitation period of six months from date of delivery of the goods, which applied to the claim involved in this suit, and that such provision applied regardless of the necessity for or fact of arbitration proceedings to settle the amount of the claim. Then on cross-examination he said:

> "There is no provision in the German Code in regard to the period of limitation in case claims have been adjudicated by arbitration by a board such as the Bremen Cotton Exchange." (Record, p. 147).

"This statement directly contradicted the other one, and would if it stood alone completely destroy the de-

fendant's plea of limitation. But probably Prof. Butte did not mean exactly what he said. Further on in his cross-examination the witness modified his testimony as to when the running of limitation would start by fixing the time at January 1st after delivery instead of at deivery. (Record, p. 149). He testified that under the statutes of Germany if the contract in question was required to be in writing, then in order to toll the statute of limitation by an acknowledgement or new promise it must be in writing. (Record, p. 149). But this statement is right in the teeth of Sec. 208, which, without distinction between contracts required and those not required to be in writing, declares that if the claim is acknowledged by part payment, payment of interest, "or in any other manner," the running of limitation is interrupted. (Record, p. 157). He also testified in answer to the court's questions that in a case (like the present one) where the contract itself made arbitration a condition precedent to the accrual of any liability or the maintenance of any suit and made the result of the arbitration conclusive upon the parties, and the circumstances were such that the arbitration proceedings could not be finished and the award had wtihin six months from date of delivery of the goods, nevertheless the claim would be outlawed by the German law if suit was not brought within six months after delivery. If he was correct in this opinion, it would convict the German law of an absurdity and injustice that we venture to say does not attach to the jurisprudence of any enlightened country. But we think he was wrong in his interpretation and that Sec. 477 was not intended to apply to such a case; and this is the view taken by the trial court. Furthermore, such a construction of the law as the witness offered is in our judgment directly contrary to the plain terms of Sec. 202, which provides that "prescription is suspended so long as the performance is stayed or the obligor is temporarily entitled on any other ground to refuse performance." (Record, p. 157). The performance by either the Birge-Forbes Company or Heye of the obligation to make good the deficiencies in the cot-

ton by the payment of money was certainly stayed until the arbitrations were had, and said obligors were entitled to refuse performance until the arbitrations were had, on the ground that the arbitrations had been agreed upon beforehand as the exclusive method of determining whether the cotton came up to the contract, and, if not, what amount of money represented the damages for its failure to do so.

"It seems to us quite clear that Secs. 220 and 218 (referred to in Sec. 220) apply to this case, especially in view of the fact that under the rules of the Bremen Cotton Exchange cases which have been appealed from the decisions of the "Classers" to the "Appeal Committee" and then arbitrated by that body are "non-appealable." Rule 17 says:

> "The decisions of the Arbitrators, and Appeal Committees are final and binding, and any appeal to courts of law is excluded." (Record, p. 23).

"The Board of Arbitration of the Bremen Cotton Exchange is either a "court of arbitration" or a "special tribunal," within the meaning of Sec. 220, and action by it brings into operation Sec. 218 and makes the period of limitation 30 years from the date of the final award. (Record, pp. 157-158). One of the definitions of "tribunal" given in the latest edition of Bouvier's Law Dictionary is "Any court, forum, or judicial body." And one definition of that word given in Webster's New International Dictionary is "A person or body of persons having authority to hear and decide disputes so as to bind the disputants." It is significant that the court, before he had ever read or heard Sec. 220 of the German Civil Code, referred, in one of his questions to Prof. Butte, to the board of arbitration constituted by the Bremen Cotton Exchange as a "tribunal." (Record, p. 151).

"It may be also worth while to note that under the German Code if a given case does not fall within any of the specific limitation provisions it will be governed by Sec. 195, which reads: "The regular period of prescription is 30 years." (Record, p. 157).

"In the above discussion we have endeavored to show that the finding of the trial court against the defendant's plea of limitation was entirely correct and should meet with the approval of this court even if we were to suppose this an equity appeal, giving the appellate court power over the facts. We now desire to advance another and independent view of the matter, which we think completely demolishes all the contentions of the Birge-Forbes Company on the limitation question in view of the condition of the record as it comes to this court and in view of the limited province of this court in reviewing actions at law on writ of error. As is fully shown by the authorities cited above under this counter-proposition, foreign laws are treated as matters of fact, are the subjects of proof, and a finding made as to what the law of a foreign country is on a given point is a finding of fact. In *Paper Co. vs. Warner,* 99 Fed., 187, Judge Lacombe said:

> "The referee was called upon to find, and did find, what provisions of English statutes were in force, and what was the law of England, at the several dates with which the case is concerned, touching the power of corporations created under English statutes to amend their articles of association, and to refuse to register transfers of stock, and what liens were or were not created under English law by transactions such as took place in this case, and what were the relative priorities of such liens under the same law. It is elementary law that our courts do not take notice of foreign law, unless it be proved as a fact in the case. *Talbot vs. Seeman,* 1 Cranch, 38, 52 L. Ed., 15; *Liverpool & G. W. Steam Co. vs. Phenix Ins. Co.,* 129 U. S. 446; 9 Sup. Ct., 469, 32 L. Ed., 788. The findings of the referee, therefore, as to English law, statute or common, are findings of fact not reviewable here. This disposes of the 30th, 32nd, 33rd, 36th and 37th assignments of error. The 31st assignment covers an exception to a finding of the referee that upon May 15, 1893, the defendant amended its articles of association in cer-

tain specified particulars. This was either purely a question of fact, or if it were a mixed question, depending in part upon a determination as to what procedure would, under English law, effect an amendment, the finding was nevertheless a finding of fact."

"In *Coram vs. Davis*, 103 N. E., 1027, the Supreme Judicial Court of Massachusetts said:

> "It has been found by the master that under the law of Montana, where apparently the contract was made, it created a joint and several liability. As a finding of fact this is binding if it is a Montana contract."

"In *Railway Co. vs. Phillips*, 196 Fed., 328, the well settled rule governing the Circuit Courts of Appeals in actions at law brought up by writ of error is stated by Judge Morrow as follows:

> "In a case of this character, this court is confined in its review to the consideration of exceptions taken at the trial to the admission or rejection of evidence and to the charge of the court and its refusal to charge. We have no concern with questions of fact or the weight to be given to the evidence which was properly admitted. *Aetna Life Insurance Co. vs. Ward*, 140 U. S., 76, 91; 11 Sup. Ct., 720; 35 L. Ed., 371; *Erie Railroad Co. vs. Winter*, 143 U. S., 60, 75; 12 Sup. Ct., 356; 36 L. Ed., 71."

"On page 74 of their brief, counsel for plaintiff in error seem to recognize the doctrine that foreign law is matter of fact when they say with reference to the issue of limitation and the testimony of Prof. Butte:

> "It was error for the court to take this from the jury, if, in fact, this testimony did not call for an instructed verdict for defendant."

"But plaintiff in error is cut off from such a contention by the fact that both sides presented to the trial court motions to direct a verdict in their favor, thus submitting all controverted matters of fact to the

court for it to decide them and then instruct the jury peremptorily upon them. (Record, p. 166).

"In *Melton vs. Trust Co.*, 190 Fed., 126, Judge Sanford said:

> "Since, however, in this case each side moved the court for peremptory instructions in its favor, unaccompanied by request for specific instructions in case the request for a directed verdict should be denied, this amounted to an admission by each side that there was no conflict in the evidence and no question presented for the jury, and to a request to the court to find the facts and direct the verdict accordingly. *Beuttell vs. Magone*, 157 U. S., 154; 15 Sup. Ct., 566; 39 L. Ed., 654; *United States vs. Bishop* (C. C. A. 8), 125 Fed., 181, 183; 60 C. C. A., 123; *Anderson vs. Messenger*, (C. C. A., 6), 158 Fed., 250, 253; 85 C. C. A., 468; *American Nat'l Bank vs. Miller* (C. C. A., 6), 185 Fed., 338, 341. And when, pursuant to such requests, the court accepted these waivers, and by its peremptory instructions determined the questions of fact and law in favor of one of the parties, each is estopped from assailing its finding upon disputed issues of fact, and is limited in the appellate court to a review of the question whether there was any substantial evidence not inconsistent with the undisputed evidence in the case, upon which to support the verdict as directed, under the issues of fact and law presented by the pleadings."

"The defendant, Birge-Forbes Company, requested six special instructions, but none of them asked that any question of fact be submitted to the jury. (Record, pp. 163-166). It took five exceptions to the charge of the court, but none of them was for failure to submit an issue of fact to the jury. (Record, pp. 184-185). It filed fourteen assignments of error, but none of them was for failure to submit a question of fact to the jury. (Record, pp. 186-189).

In the instant case the Circuit Court of Appeals said:

> "Even if Heye had been in a position to defeat the claims under a plea of limitation, not having so defeated them, but having done that which the contract contemplated that he should do, and which common honesty required he should do, he is entitled to reimbursement from his principal. As between him and defendant, section 477 manifestly has no application."

Petitioner criticizes this proposition and cites some authorities to the contrary. While the decision of the court affirming the judgment below can easily be sustained without maintaining the proposition referred to, nevertheless such proposition is supported by respectable authority as well as by sound morality.

In *Cahill vs. Bigelow*, 18 Pick., 369, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts held that the trustee in a trustee process, or garnishment, had a right to observe his moral obligation and make good his oral guaranty, which was unenforceable under the statute of frauds, though the result was to defeat the claim of the attaching creditor.

In *Lee vs. Stowe*, 57 Tex., 444, a guarantor who could have avoided payment under the statute of frauds went ahead and made payment and then sued his principal for indemnity, who pleaded that the payment made by the guarantor was voluntary and unnecessary, and hence that no recovery against the principal should be had. The court said:

> "If the plaintiffs, at the request of the firm of M. C. Lee & Co., verbally guaranteed the payment of bills of goods which they purchased, then upon payment of such bills by the plaintiffs when they became due they are entitled to recover the same, whether such payments were made before or after

the dissolution of the firm of M. C. Lee & Co., and if after dissolution, whether there was notice of that fact or not; and this, notwithstanding the plaintiffs might have interposed the statute of frauds as a defense had they been sued by the sellers upon their verbal guaranty. *Beal vs. Brown*, 13 Allen, 115; *Cahill vs. Bigelow*, 18 Pick., 372; *Ames vs. Jackson*, 115 Mass., 512; *Brown on Statute of Frauds*, 116, 135; *Godden vs. Pierson*, 42 Ala., 374.

"It is true that the verbal guaranty was an imperfect obligation as between the sellers and plaintiffs, but it was upon valuable consideration, and, as between the plaintiffs and M. C. Lee & Co., not in violation of the statute of frauds, or of any rule of public policy.

"It was an obligation morally binding, which M. C. Lee & Co. had no right to ask them to violate by interposing the statute of frauds as a defense; nor had they even the right, when the bills matured and they failed to meet them themselves, to ask the plaintiffs to refrain from promptly paying them as they were morally bound to do. 18 Pic., 369."

It is true that neither of the two cases cited involved the statute of limitations, but we are unable to see why that statute should be held any more sacred than the statute of frauds.

QUESTION (e).

Petitioner's contention with respect to Question (e) is completely answered by the following quotation from the brief aforesaid:

"COUNTER PROPOSITION TO PLAINTIFF IN ERROR'S SEVENTH PROPOSITION.

Inasmuch as the court could take judicial notice of the value of a German mark, expressed in terms of American money, and inasmuch as the evidence on the

trial showed without substantial dispute that such value was 23.8 cents, the court properly took such value as the basis for determining the amount of the verdict to be directed. Furthermore, defendant, by moving the court for a directed verdict in its favor, waived and surrendered any right to claim that there were issues that should go to the jury.

STATEMENT.

"By agreement the following statement was made and put into the record:

> " 'By agreement of counsel for defendant, plaintiff's counsel was permitted to state as evidence that Webster's New International Dictionary states the value of a German mark in American money to be 23.8c; that is, 23.8c is the standard value of a German Mark.' (Record, p. 143).

"N. B. Birge, president of the defendant company, testified in behalf of the defendant that according to the New York quotations of exchange on Germany a German mark was worth at the time of the trial 18⅛c, but on cross-examination he admitted that his statement was based solely upon the foreign exchange market in New York and that he had no information as to what the actual German money, if here in America, would be worth in American money. (Record, pp. 152-154).

"On this question of the value of the German mark, the court said in his charge:

> " 'The remaining question is, for how much shall the verdict be? The court as a matter of law is compelled to take judicial knowledge of the fact that a German mark is worth 23.8c in American money. It is contended by the defendant company that at this time a German mark is only worth 18⅛c. I have not thought it necessary to investigate any more fully than I have, but I pause here to call attention to the fact that there is no evidence in this record that at the time the plaintiff,

Carl R. Heye, paid off the claims of the reclamation claim holders, the German mark was depreciated to any extent. Now ordinarily the measure of liability would be what he paid at the time and place of the payment. The court judicially knows the normal value of the German mark is 23.8c and there is no evidence showing that when Carl R. Heye paid the claims of the reclamation claim holders that the German mark was worth less than 23.8c. There is testimony in the record which is undisputed from any source that a party desiring to purchase German exchange at this time could purchase it estimating the value of a German mark at 18⅛c. The question for me to determine is whether in directing this verdict I shall be governed by the value of the German mark at 23.8c, as the court finds it to be, or 18⅛c, as the only witness who has testified to the value of it in the purchase of exchange states it to be at this time. I am of the opinion that in expressing this verdict the equivalent in dollars and cents of the German marks paid by the plaintiff to the reclamation claim holders on the 6th of May, 1914, that I should estimate the American money which is expressive of that amount of German marks at the rate of 23.8c.

" 'I find therefore that the plaintiff is entitled to recover from the defendant company the amount of money paid by him on May 6th, 1914, which amount in German money was 159,715.97 German marks, and the court finds that the American equivalent of that in American money at the time of the payment, to-wit, May 6th, 1914, was $37,533.25. Now the plaintiff is entitled to interest on that amount from the date of the payment until the rendition of this judgment. The time for which interest should be estimated, according to my recollection, is two years and eights months, and the rate per cent at which interest could be calculated is 4%. I therefore calculate the interest, at 4% for two years and eight months, which in-

terest, according to my calculation, amounts to $4,003.54, being a total of principal and interest to the date of this trial on this day of $41,536.79. Under the view of the law which the court takes, and the evidence adduced on the trial, I direct the jury to return a verdict for plaintiff for $41,536.79." (Record, pp. 183-184).

"The opening sentence of the court's charge shows that each side submitted to him an oral motion to direct a verdict in its favor. (Record, p. 166).

"The defendant also presented to the court six special instructions, all of which were peremptory charges to find for the defendant, except the fifth, which itself was a peremptory instruction to treat the German mark as worth 18⅛c, as claimed by defendant. (Record, pp. 163-166).

AUTHORITIES.

7 Encyclopedia of Evidence, 906.
Hogue vs. Williamson, 85 Tex., 553.
2 Foster's Federal Practice (5th Ed.). p., 1556.
Sena vs. American Turquoise Co., 220 U. S., 497, 55 L. Ed., 559.
Melton vs. Trust Co. (C. C. A.), 190 Fed., 126.

ARGUMENT.

"In 7 *Encyclopedia of Evidence*, 906 this language is used:

> "The value of foreign currency may also be judicially known when it is a matter of common knowledge.'

"We suppose that our courts would not take judicial knowledge of the value in American dollars of the money of a country of small commercial or financial importance, such as Serbia, or perhaps Mexico; but that they would judicially know the value of the money issued by a great commercial nation, such as England, Germany or France, especially if the time as of which

the value was to be determined was known to current history as a time of peace and prosperity for the nation in question and as a time when nothing extraordinary had happened to depreciate such money below its ordinary and standard value.

"Obviously Heye was entitled to recover from the Birge-Forbes Company complete reimbursement, no more and no less. If he paid to the creditors on May 6th, 1914 (which date the courts judicially know was before the outbreak of the war in Europe) German marks worth 23.8c each, and was now permitted to recover from his principal only the value of the same number of marks reckoned at 18⅛c each, it is perfectly plain that he would not obtain complete reimbursement.

"The case of *Hogue vs. Williamson*, 85 Tex., 553, cited by plaintiff in error, is in point here. In concluding the opinion the court said:

> " 'We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its *maturity*, he had made a *prima facie* case, and our opinion will be certified accordingly.'

"The above shows that the value of the foreign money at the maturity of the debt is the thing to be determined, its value at any subsequent time being immaterial. Now, the date of the maturity of the Birge-Forbes Company's obligation to reimburse Heye was May 6th, 1914, the date he made the payments in question to the Bremen creditors. And it was determined both by judicial cognizance and by evidence that the value of the German mark at that time was 23.8c.

"It should also be remembered that this question of the value of the German mark is a matter of fact, and that it cannot be said that the court's finding upon it is without any evidence to support it."

It being the well settled rule of this court, declared in *United States vs. Rimer*, 220 U. S., 547, 55 L. Ed.,

578, *Forsyth vs. Hammond*, 166 U. S., 506, 41 L. Ed., 1095, and other decisions, to exercise sparingly and only in exceptional cases the jurisdiction to grant writs of certiorari to the Circuit Courts of Appeals, we submit that the instant case presents no features which under the established practice of this court would call into exercise the jurisdiction aforesaid.

Furthermore, we maintain that on each of the questions presented in the petition for certiorari the holding of the Circuit Court of Appeals is correct.

We respectfully pray that the petition be denied.

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.....
Of Counsel.

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IN THE

Supreme Court of the United States

THE BIRGE-FORBES COMPANY, Plaintiff in Error,

vs.

CARL R. HEYE, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LASSITER & HARRISON,
ROBT. M. ROWLAND,
WOOD, JONES & HASSELL,
Attorneys For Defendant in Error.

BRIEF OF THE ARGUMENT.

QUESTION AS TO LEGAL RESULT OF HEYE'S BECOMING AN ALIEN ENEMY AFTER JUDGMENT IN TRIAL COURT AND BEFORE SUBMISSION OF CASE ON WRIT OF ERROR.

The following language of Justice Clifford in the case of *Hanger vs. Abbott*, 6 Wallace 532, states the sole basis and reason underlying the doctrine denying an alien enemy the right to sue in the courts of this country:

> "We preclude him during the war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy."

In the instant case that basis or reason does not exist, for the judgment of the Circuit Court of Appeals fully protects the interests of the United States by requiring

the money due Heye on the judgment of the trial court to be paid to the clerk of the trial court, and not to Heye, and to be by said clerk paid over into the hands of the Alien Property Custodian appointed by the President under the "Trading with the Enemy Act." Not only did this disposition of the proceeds of the judgment make it impossible for the money to reach Germany and be used as sinews of war against our country and its allies, but such disposition of the proceeds went further and made it both possible and probable that said money (if it had been collected) would have been invested in Liberty Bonds, until the close of the war, and thus have been made to help fight for this country.

In our judgment the foregoing is a complete answer to plaintiff in error's entire contention on the alien enemy question, but we beg to call attention to a few authorities which in the application of the alien enemy doctrine establish a distinction between cases where the alien plaintiff becomes an enemy before his case goes to judgment in the trial court and cases where he is an alien friend at the time he recovers his judgment, but by the subsequent outbreak of war between the two nations in question becomes an alien enemy before the other party's appeal or writ of error is submitted in the higher court.

A reading of the authorities cited in the opposing brief will disclose that the diligence of the able attorneys for plaintiff in error has not rewarded them with the discovery of a single case holding that it is proper to dismiss or suspend the suit or in any way delay the submission of the cause in the appellate court and the affirmance of the judgment below because of the fact that since the rendition of judgment in the trial court and before time for submission of the case on writ of error in the apellate court war has supervened between the country of the forum and the country wherein the plaintiff in the action has his residence and citizenship.

On the contrary, we find three decisions by very eminent courts declaring that under such circumstances as exist in the instant case the fact of the plaintiff becoming an alien enemy after the rendition of the judgment in his

favor in the trial court furnishes no reason whatever for the appellate court to refuse submission of his case or affirmance and collection of his judgment if no reversible error is found in the record. The case of *Owens vs. Hanney*, 9 Cranch, 180, is very brief and pointed, and we beg to quote it in full as follows:

"Error to the Circuit Court for the District Georgia, in an action of assumpsit, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

"The plaintiff below is stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia.

"A demurrer to the declaration having been overruled, the defendant pleaded non-assumpsit, upon which issue the verdict and judgment were against him in May, 1811, and he brought his writ of error.

"In the transcript of the record which came up, a blank is left for the names of the jurors, but in other respects the record appears to be perfect. The verdict and judgment are fully stated.

"War was declared by the United States against Great Britain on the 18th of June, 1812, and continued at the time of the argument in this court.

"Harper, for the plaintiff in error, contended:

"1. That as it appeared upon the record that the plaintiff was an alien enemy, and the defendant had had no opportunity to plead that fact, this court ought not to affirm the judgment; and,

"2. That the omission of the names of the jurors was fatal inasmuch as it did not appear from the record that it was the verdict of a legal jury.

"March 1st. Absent—Todd, J.

"Marshall, Ch. J., stated the opinion of the court to be that the omission of the names of the jurors was not material. Nothing was said upon the first point.

"Judgment affirmed with costs."

Any efforts to explain away or discredit this decision of the Supreme Court of the United States, announced through the great Chief Justice himself, must be unavail-

ing. We cannot imagine any reason why its authority and binding force should be questioned. Two points were clearly presented to this court by the record in that case, one of which was the very point now under discussion and the other was the contention that the omission of the names of the jurors in the record was fatal to the validity of the judgment below. Both points were necessarily decided, but only the latter was discussed by Chief Justice Marshall, and that very briefly. The only reason that suggests itself why the discussion was confined to the second point is that the court deemed it more debatable than the other, and considered that the law with reference to the other was so clear that discussion did not appear to be necessary. Inasmuch as both points were clearly and squarely presented to the court and both had to be passed upon in order to arrive at an affirmance of the judgment, there is no escape from the conclusion that both points were considered and actually decided by the court. After diligent search we have been unable to find where the Supreme Court of the United States or any other court has ever cited with disapproval or questioned the authority of this case of *Owens vs. Hanney*. On the contrary, we find it cited with approval by the Supreme Judicial Court of Massachusetts, in the case of *Kershaw vs. Kelsey*, 100 Mass., 561, and by Judge Speer of the United States District Court for the Southern District of Georgia in the case of *Plattenberg vs. Kalmon*, 241 Fed., 605.

In the case last cited Judge Speer, after discussing the case of *Howes vs. Chester*, 33 Ga., 89, and expressing his disapproval thereof, said:

> "Besides, it seems in conflict with Owens vs. Hanney, 9 Cranch, 179, 3 L. Ed., 697. That, too, was a case from this State. The action had been brought by a British subject against a citizen of the United States, and judgment obtained in 1811. An appeal was taken, and war was declared with Great Britain on June 18, 1812, and continued at the time the case was argued in the Supreme Court. It appears from the report that counsel for the American litigant argued that the plaintiff was an

alien enemy, and for that reason the court ought not to affirm the judgment against a citizen of the United States. It was affirmed, however, through Chief Justice Marshall.

"True, the Chief Justice said nothing on the precise point here involved. It may not, however, be doubted that it was considered by the illustrious jurist, who had been the associate of Patrick Henry in the memorable trial, Ware vs. Hylton, 3 Dall., 199, 1 L. Ed., 568, in which they jointly sought to defeat enforcement of the British debts. Besides, with the evolution of law, the courts of the English-speaking peoples exhibit greater magnanimity in affording opportunity of redress to alien enemies. Notwithstanding a ruling of Sir William Scott, afterwards Lord Stowell, made in 1799, to the contrary, the British prize courts of today hear any alien enemy asserting rights under a convention of the Hague Peace Conference. Shall the courts of the United States then wholly deny a hearing to one, not such when he here sought redress, but who has since become an alien enemy? To do this, would not, in my judgment, accord with the spirit of our institutions, nor with the spirit of our government, which disclaimed hostilities to the German people when it proclaimed war in defense of freedom and of a common humanity.

"My conclusion, therefore, is that the action should not be dismissed, but merely be suspended while hostilities continue. This may be readily accomplished by orders continuing the proceeding from term to term, or until the declaration of peace."

In *Kershaw vs. Kelsey*, 100 Mass., 561, the Supreme Judicial Court of Massachusetts, speaking by Judge Horace Gray, used this language at page 564 of the report:

"The reasons assigned by common law judges for the plea of alien enemy are, that an enemy to our government shall not have the benefit and protection of its laws in its courts; and that the fruits of the action may not be remitted to a hostile country, and so furnish resources to the enemy. Hutch-

inson vs. Brock, 11 Mass., 122. Sparenburgh vs. Bannatyne, 1 B. & P., 170. M'Connell vs. Hector, 3 B. & P., 114. The objection has not been much favored; for even in a real action, after the plaintiff has recovered judgment, alien enemy at the time of the original suit is no good plea to scire facias to obtain an execution; West vs. Sutton, 2 Ld. Raym., 853; S. C. 1 Salk., 2; Holt, 3; and in a personal action brought by an alien friend, his becoming an enemy by the breaking out of war, which could not have been pleaded earlier, has been held no ground for staying judgment after verdict, or execution after judgment, or affirmance of a judgment on error. Venbrynen vs. Wilson, 9 East, 321. Buckley vs. Lyttle, 10 Johns., 117. Owens vs. Hanney, 9 Cranch, 180."

Another case in point here is *Buckley vs. Lyttle*, 10 Johns. 117, which was decided by the New York Supreme Court of Judicature while that tribunal was presided over by James Kent, the great chancellor and commentator. This opinion is also short and to the point, and we take the liberty of quoting it in full, as follows:

"A motion was made in this cause, in behalf of the defendants, to set aside the execution, on an affidavit, stating that the judgment was obtained prior to the late declaration of war against Great Britain; that the plaintiff is an alien enemy, and resided at the time when the judgment was obtained, and now resides in Canada, within the territory of Great Britain.

"Per Curiam. The case of Van Brynen et al. vs. Wilson, 9 East, 321, is in point, to show that the court will not interfere, in such a case in this way. In that case the plaintiffs, after verdict, became alien enemies, and the court of K. B. refused to stay the judgment and execution, on motion. They said 'that if the defendant had any remedy by law, he might avail himself of it, if so advised, but that they would not interfere in the manner proposed. on such an occasion.' The motion must be denied."

The case of *Bishop vs. Jones and Petty*, cited in the opposing brief, was, like the other authorities cited by plaintiff in error, a case where the plea of alien enemy was actually interposed in the trial court and before judgment rendered. That is, of course, an entirely different situation from the one now before this court and which was before it in the case of *Owens vs. Hanney*. However, it was ruled in said Texas case that, even if a state of war had supervened between the filing of the suit and the trial of the case in the court below, the plea of alien enemy interposed at the trial would not cause the dismissal of the suit, but only the staying of proceedings until the termination of the war, at which time the prosecution of the suit could be resumed. The court further held that, inasmuch as the war had ended before it was called upon to decide the case upon appeal, the error, if such there was, upon the part of the trial court in not staying the proceedings until the termination of hostilities had become immaterial; and therefore the Supreme Court affirmed the judgment. The following language quoted from the opinion in that case is in harmony with the other authorities cited by us showing that the plea of alien enemy in modern times is not one favored by the courts:

> "Their plea was merely dilatory, and would only have stayed the appellees' suit until the termination of the war. Though it should be upheld and sustained in cases to which it is applicable when properly presented, yet it is called in the books an 'odious plea' (Clark vs. Morey, supra), and it will not, therefore, be aided by construction."

In view of the foregoing decisions, at least two of which are directly in point here, and in view of the fact that the Circuit Court of Appeals is strictly a court of errors, whose sole province is to examine the record sent up from the lower court and determine whether or not it shows reversible error committed by the trial court, we think it quite clear that the motion to suspend consideration of the case until the end of the war was properly overruled by the Circuit Court of Appeals.

DEPOSITIONS OF HEYE AND POLLETIN

In view of the agreements or waivers signed by counsel for the Birge-Forbes Co., under which the depositions of Heye and Polletin were taken, and in view of the fact that said company, by its attorneys, propounded cross interrogatories to these witnesses without reserving any objections, and in view of the further fact that the manner of taking and returning these depositions was substantially regular and wholly free from any suspicion of unfairness, the trial court properly refused to suppress said depositions and properly allowed them to be used as evidence, and the Circuit Court of Appeals committed no error in sustaining such action of the trial court.

In ruling on the motion to suppress the depositions of Carl R. Heye and Oscar Polletin the trial court, after referring to and commenting upon certain Federal statutes concerning depositions, said:

> "The other section called to my attention is this Act of March 9, 1892, which provides that in addition to the mode of taking depositions of witnesses in cases pending at law or in equity in the District or Circuit Courts of the United States, it is lawful to take depositions of witnesses in the mode provided by the laws of the State in which the courts are held. There seems to have been an effort to pursue the method provided in the Act of March, 1892, in taking these depositions, and here as a matter of fact is what happened: The plaintiff in this case propounded the interrogatories to the witnesses. The defendant company by its attorneys propounded cross interrogatories to those witnesses, and upon those direct and cross interrogatories the depositions were taken, which depositions are now sought to be quashed. Plaintiff's attorneys at the conclusion of the interrogatories prepared an agreement which I am going to read:
>
> "Time, notice, copy and issuance of commission are hereby waived, and it is agreed that any qualified officer may proceed to take and return the depositions of the witnseses on the original direct and

cross interrogatories with the effect as if a commission had regularly issued.'

"That was the language as originally prepared. Now, it appears beyond controversy that that was submitted to attorneys for defendant and they struck out the following words and added the following words: In line one they eliminated the words 'and issuance of commission,' and in line two they erased the words 'any qualified,' in line four they erased the words 'in like effect as if a,' and then following the word 'commission' in line five they struck out the words 'had regularly issued.' They added the word 'but' in line four, and added after the word 'commission' the words 'is not waived,' so that as changed the language was as follows:

" 'Time, notice and copy are hereby waived, and it is agreed that officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories, but commission is not waived.'

"To the interrogatories to the witness, Oscar Polletin, this is the language finally signed by counsel for defendant:

" 'Time, notice and copy ar ehereby waived, and it is agreed that the depositions of the witness may be taken on the original direct and cross interrogatories.'

"The writing which in itself is scant, contains a waiver, and an agreement as well. I think I must consider it in the light of what happened at the time the agreement was made. Here was an effort by plaintiff's counsel to take the depositions of the witnesses, Heye and Polletin, in answer to the interrogatories then and there tendered to counsel for defendant. It must have been in the minds of all the parties that the purpose was to have Heye appear and answer these interrogatories, and such cross interrogatories as defendant's counsel might file. Defendant's counsel did file their cross interrogatories, after signing the agreement I have read. I must give that agreement its common sense con-

struction and that is that the proper officer might have these witnesses appear before him and answer the interrogatories and swear to them and the officer transmit the answers to the court here, for that was evidently the purpose of counsel when they signed the agreement and when the interrogatories and cross interrogatories were prepared. Time, notice and copy were waived; in fact, everything was waived except the issuance of commission, and then follows the agreement which says that it is agreed that the officer may proceed to take and return the depositions of the witnesses on the original direct and cross interrogatories. That was an agreement that they might take the answers and return the answers on those direct and cross interrogatories. The parties to the suit simply agreed that to those written interrogatories the answers and depositions of the witnesses might be taken and used in court in this trial as evidence. The parties had the power as well as the right to make this agreement and have it upheld by the court. They had the right to agree to an absolute final judgment in this case, and, of course, could agree to anything as to the procedure leading up to the judgment.

"That presents for decision before me the proposition as to whether the method in which the depositions were returned was fair and free from suspicion. It was a substantial compliance with the State statute on the subject of the return of depositions, and seems to have been an effort to comply with it.

"An inspection of the envelope in which these depositions were returned shows that the case was properly styled, and that the officer who took the depositions made this certificate:

" 'I, Dr. jur Robert Voight, the officer before whom the within depositions were taken, do hereby certify that I, in person, deposit this package with the office of the Consulate of the United States of America, Bremen, Germany, for transmission on this day.

'Bremen, November 13th, 1916.'

"Signed with the signature of the officer and seal.

"Following that is this certificate:

" 'Received this package on the 13th day of November, 1916, from the hands of Dr. jur Robt. Voight, the officer before whom the depositions were taken, and forwarded same the 25th day of November, in the official mail pouch to the Department of State, Washington, D. C., for further transmission to the addressee.

'WILLIAM THOMAS FEE,'

"Consul of the United States of America,

'Bremen, Germany.'

"I have before me as a part of the record this envelope which bears the words 'Department of State, U. S. A.,' and shows by endorsement on it that it came by registered mail and that it was directed to the clerk of the United States District Court, Sherman, Texas. I can only infer that the envelope containing the depositions, with the certificates I have read, reached here in the white envelope which bears the evidences of having been sent hereby the Department of State of the United States of America. I have before me the clerk's certificate on the envelope containing the depositions that he received the same from the postoffice at Sherman on the 30th day of December, 1916, and that it was opened at the request of the attorneys for the defendant. I hold that under the circumstances which I am bound to consider in connection with the taking and returning of these depositions, and the conditions which prevail in reference to the method by which mail and intelligence can be transmitted under the conditions produced by the great war, the method of taking and returning the depositions was a substantial compliance with the law, and a sufficient compliance in the light of the agreement made; that the manner of taking and returning the depositions is free from suspicion of unfairness, and I therefore overrule the motion to quash." (Record, pp. 67-70.)

AUTHORITIES.

Bank vs. Seton, 1 Pet., 299, 7 L. Ed., 152.
Shutte vs. Thompson, 15 Wall., 151, 21 L. Ed., 123.
Buddicum vs. Kirk, 3 Cranch, 293, 2 L. Ed., 44.
Rich vs. Lambert, 12 How., 347, 13 L. Ed., 1017.
United States vs. Boxes of Lace, 92 Fed., 601.
4 Corp. Jur., p. 805.
Railway Co. vs. Love, 169 S. W., 922.

We think a reading of the trial court's order and opinion overruling the motion to quash the depositions of Heye and Polletin will make it clear to this court that the ruling was correct. (Record, pp. 67-70.)

In addition to referring to the trial court's discussion of this matter, we beg to call attention to a few authorities. In this case the attorneys for the defendant not only signed the waivers and agreements quoted by the trial court, but cross-examined the witnesses without making any protest or reserving any objections, which in itself was a waiver of any right to suppress the depositions or prevent their use as evidence. In *Bank vs. Seton*, 1 Pet., 299, 7 L. Ed., 152, the court said:

> "An objection, however, has been made, preliminarily, to this court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the court for that purpose.
>
> "Admitting this to have been irregular, no objection appears to have been made in the court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there, because the defendants cross-examined the witness, which would be considered a waiver of the irregularity."

In *Rich vs. Lambert*, 12 How., 347, the court said:

> "Further evidence has been taken, on the part of the respondents, since the appeal to this court was entered, which is objected to by the appellants.
>
> "The Act of 3d March, 1803, (2 Stat. at Large, 244), allows additional evidence to be furnished by

either party before this court in cases of appeals in admiralty and prize causes. And by the 27th rule of the court the evidence is to be taken under a commission to be issued from this court, or from the Circuit Court, under the direction of any one of the judges thereof.

"The objection taken to the evidence is that it does not appear from the record that any order was obtained from either court for the issuing of the commission. We have, however, before us the commission itself, issued in the usual form by the clerk of the Circuit Court, and in the execution of which both parties have joined. An order, therefore, must have been entered, or, if not, it was waived by the act of the parties in suing out the commission, and joining in its execution. For these reasons we think the further evidence furnished to this court admissible."

The case of *United States vs. Boxes of Lace*, 92 Fed., 601, is directly in point here as to the manner of making return of the depositions. Note the following from the opinion:

"The commissions on the return were properly addressed to the clerk of the court, as directed; and as directed they were sent by mail. It is immaterial that they were forwarded through the embassy bag by mail to Washington, and thence to the clerk, instead of directly to New York."

In 4 *Corpus Juris*, p. 805, the author says:

"The action of a trial court in regard to the taking or the suppressing of depositions is ordinarily largely one of discretion, and in such cases only reviewable in case of palpable abuse."

To the same effect is the case of *Railway Co. vs. Love* (Tex. Civ. App.), 169 S. W., 922."

In addition to the foregoing we beg to present certain further considerations. Both Heye and Polletin were undoubtedly competent witnesses in this case and in the court in which the same was pending. Section 1464 of U. S. Complied Statutes, 1916 (which is Rev. Stat., Sec. 858, as amended in 1906), provides:

> "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held."

The Texas statute on the subject (Rev. Stat. of 1911, Art. 3688) reads:

> "No person shall be incompetent to testify on account of color, nor because he is a party to a suit or proceeding or interested in the issue tried."

The *de bene esse* statute (U. S. Comp. Stat., Sec. 1472) provides that the depositions of *any witness* may be taken when the conditions therein named exist. This undoubtedly includes parties to the suit when they are competent witnesses according to the laws of the State where the Federal court in question is sitting and when the requisite conditions as to distance of residence from place of holding court, etc., exist. See *Lowrey vs. Kusworm*, 66 Fed., 539; *Hartmon vs. Feenaughty*, 139 Fed., 887; *Blood vs. Morrin*, 140 Fed., 918.

It is likewise true that under the *dedimus potestatem* statute (U. S. Comp. Stat., Sec. 1477) the depositions of parties, as well as other competent witnesses, may be taken and used. This statute does not use the expression "any witness," but from its language and purpose and the fact that it makes no distinction between witnesses who are parties and witnesses who are not parties, the conclusion stated is unavoidable. Under the *dedimus* statute the depositions of witnesses in foreign countries may be taken. See *Campania, etc., vs. Ingraham et al.*, 180 Fed., 516 *Stein vs. Bowman*, 13 Pet., 209, 10 L. Ed., 129.

It is, therefore, quite evident that, if the attorneys for the Birge-Forbes Company had not made the agreements and waivers set out and discussed by Judge Russell in the quotation hereinabove made, the attorneys for Heye could and would have applied to and obtained from the court a *dedimus potestatem* commission, or a commission under the Act of 1892, and secured in that way

the depositions of Heye and Polletin. The Birge-Forbes Co., through its attorneys of record, had the right to waive such formalities and let the depositions be taken in the manner they were taken. This the Birge-Forbes Co. did by the waivers and agreements aforesaid.

There was a substantial compliance with the statutes of Texas as to the manner of taking and returning these depositions; and in our judgment they would not have been suppressed if the case had been pending in one of the courts of that State. The only irregularity claimed is with reference to the mere transmission of the depositions from Bremen, Germany, to Sherman, Texas; and the exact manner of transmission is the least important part of the proceedings.

In *Garner vs. Cleveland*, 35 Tex., 74, the Supreme Court of Texas said:

> "Article 3729, Paschal's Digest, which points out the mode in which depositions may be transmitted by mail to the clerk of the court in which they are to be used, is a directory statute, and, as this court has repeatedly decided, a substantial compliance with the directions of the statute is all that is required where there is nothing to raise a presumption of fraud."

In *Andrews vs. Parker*, 48 Tex., 94, the officer taking the depositions personally handed them to the clerk of the court instead of mailing them or sending them by the hand of another person, the only two modes of transmission for which there was express authority. The court said:

> "This presents a case where the requirements of the statute have been complied with in substance, without doing that which the terms of the statute presuppose would ordinarily be necessary to be done in taking depositions, which is, that they would be transmitted from the officer taking them to the clerk, either by mail, or by some person who would take them and deliver them."

The court then proceeded to hold that the trial court was right in refusing to suppress the depositions.

Borrowing here an expression from the brief of the plaintiff in error in the instant case, the officer taking the depositions in the *Andrews vs. Parker* case substituted for the exact statutory mode of return a mode which he thought "just as good;" and the Supreme Court of Texas agreed with him that it was "just as good," and upheld the action of the trial court in refusing to suppress the depositions.

In *United States vs. Reyburn*, 6 Pet., 352, the Supreme Court of the United States used this striking expression:

> "Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed."

The same may be said of the rules governing the return of evidence into court when taken at a distance in the form of depositions; and in fact the language quoted applies to all legal rules.

In returning the Heye and Polletin depositions the statutes were substantially complied with; and in our judgment such depositions would not have been quashed if the suit had been pending in the state courts of Texas.

EFFECT OF JUDGMENT OF MAY 23, 1913, AS RES ADJUDICATA.

The judgment of May 23, 1913, fully established the validity of the Bremen Awards as a whole, the undisputed amount of which awards was 312,749.30 German marks, the equivalent of which in American money was about $74,820.52. In the trial of the first case between Heye and the Birge-Forbes Co., which went to judgment May 23, 1913, all the arbitration awards for the cotton season of 1910-1911 were involved together, were in exactly the same category, had exactly the same status, were subjected to exactly the same attacks, and under the issues made were necesarily required to stand as a whole or fall as a whole. .They stood as a whole, and the only reason for not then rendering judgment for the full amount of all the awards and interest thereon was that

the suit was premature to the extent of the amount not actually paid by Heye at that time on the awards, he being held to be a surety or guarantor for the Birge-Forbes Company and his cause of action not ripe until actual payment by him. Therefore it being shown by the undisputed evidence that he had made partial payments aggregating $36,610.90, he was given judgment for that amount (plus a small sum for other items not of interest here), and was denied a recovery for the rest until he should pay the rest.

The pleadings upon which the first case between these parties was tried were introduced by the plaintiff at the trial of the present case for the purpose of showing the issues in the other suit and to support his allegations of *res adjudicata*. (Record, 69-79.)

Plaintiff's original petition in the first suit, which was filed November 7, 1911, after stating the jurisdictional facts and showing that for a number of years Heye was the selling agent for the Birge-Forbes Co. on the Bremen cotton market, alleged:

"That it was a part of said contract and arrangement as so defined and explained and as mutually understood and acted upon by both parties that all cotton offered by defendant for sale through plaintiff was to be even running cotton, of good color and staple; that all sales were to be made subject to and to be governed by Bremen class and arbitration; and that all sales were to be made subject to and to be governed by the rules of the Bremen Cotton Exchange.

"That acting under and in accordance with the aforesaid contract and arrangement, plaintiff made sundry sales for defendant, at Bremen, Germany, of large quantities of cotton during the time intervening between about October 1st, 1910, and about May 1st, 1911, such sales being made to a number of different buyers, that the buyers of said cotton purchased the same under the rules of the Bremen Cotton Exchange and subject to Bremen class and arbitration. That the rules of the Bremen Cotton Exchange required all disputes and con-

troversies between seller and buyer as to the staple, class, grade or quality of cotton sold to be conclusively determined and settled by means of arbitration, the procedure in such arbitration proceedings being fully defined and set forth in the published rules of said Bremen Cotton Exchange.

"That in the sales of cotton last aforesaid, made by plaintiff for defendant, disputes and controversies did arise between the seller and the buyers as to the staple, class, and quality of the cotton sold. That the buyers of said cotton made claim that the cotton delivered to them was not up to the staple, quality and description offered by defendant, and upon which the price was based, and that the cotton delivered was not in compliance with the contracts of sale whereupon such claims, disputes and controversies were duly and regularly submitted to arbitration under and in accordance with the rules of the Bremen Cotton Exchange, the final result of such arbitrations being that awards or allowances aggregating the sum of, to-wit, 312,749.30 German marks, equivalent to about $74,334.33, were made in favor of said purchasers on their claims against defendant.

"That in such arbitration proceedings plaintiff represented the interests of defendant, as his authority and duty required, and obtained for it the best results that were in his power or that were practicable. That said arbitration proceedings were in all respects regular, and the awards or allowances aforesaid were made in good faith.

"The defendant was duly, legally, promptly and within the time prescribed by the rules and customs of the Bremen Cotton Exchange, notified of the pendency of such arbitration proceedings and also of the results of same upon their termination.

"That upon the final termination of said arbitration, plaintiff, by virtue of his aforesaid contract and arrangement with defendant and under the rules of said Bremen Cotton Exchange, became bound and legally liable to pay at once to said purchasers the said awards or allowances

made to them by the arbitrators. That shortly after the termination of said arbitrations plaintiff paid out on said award or allowances the sum of, to-wit, $30,000.00, and still owes and will have to pay the further sum of, to-wit, $44,334.33. That by the aforesaid contract and arrangement between plaintiff and defendant and by the custom and course of business between them and by the rules of the Bremen Cotton Exchange, defendant became liable and promised plaintiff to pay to him immediately upon the termination of said arbitrations, or else upon demand, the said sum of, to-wit, $74,334.33, in order to protect and indemnify plaintiff against any loss by reason of his liability to the purchasers of the cotton." (Record, 70-72.)

In said first suit the defendant, the Birge-Forbes Co., pleaded, in addition to the general denial, that on August 21, 1908, it had instructed plaintiff by letter that in future sales he was to have it agreed with the buyers that: "Arbitration differences for grade and staple will be those in effect (the actual differences made on C. I. F. and six cotton sold by us) at the time of the sale instead of the last day of landing;" that plaintiff had failed to carry out completely this instruction in that he had only stipulated thereafter in each sale contract that the arbitrators in Bremen were to apply the differences that existed on the date of sale instead of those that prevailed on the last day of landing of the cargo, as was ordinarily done under the Bremen rules, whereas defendant contended that he should have gone further and also have stipulated for the application by the arbitrators of such differences in value between different grades or staples of cotton as were fixed by the Birge-Forbes Company's own sales of C. I. F. and 6% cotton, instead of the application of such differences as were fixed by the Bremen spot market and evidenced by the printed statements promulgated by the Bremen Cotton Exchange; that such alleged failure of plaintiff to obey instructions resulted in injury to said Birge-Forbes Company in the arbitrations at Bremen, and should prevent plaintiff from recovering reimbursement for his payments on said arbitration awards; that it was the duty

of plaintiff, Heye, as selling agent for the Birge-Forbes Company, in each case where arbitration was demanded by the buyer of the cotton at Bremen, to join with the buyer in drawing samples of the cotton and to see to the correctness of the "Note of Instructions" that under the rules of the Bremen Cotton Exchange would go with the jointly drawn samples to the "sample room" of said Exchange, where the arbitrators or "classers" appointed under the rules of said Exchange would examine the samples and the note of instructions accompanying same and stating the conditions under which the cotton was to be arbitrated, and would then make their decision and award; that Heye failed to perform this alleged duty with reference to the drawing of the samples and the making of the notes of instructions, resulting in injury to defendant's rights and preventing plaintiff from recovering any reimbursement; that by reason of plaintiff's alleged disregard of the instructions given him in said letter of August 21, 1908, and by reason of his alleged failure of duty with respect to the samples and the notes of instructions, all the arbitrations involved in the suit (being those for the season of 1910-1911) were null and void because not conducted under terms of submission agreed to by defendant, but under different and unauthorized terms; that on January 27, 1911, by written agreement entered into at Sherman, Texas, between Heye and the Birge-Forbes Co., said Heye waived and abandoned said Bremen awards and agreed to a new arbitration to be had at Liverpool under conditions set out in said writing; and that thereafter Heye wrongfully prevented the making of any arbitrations at Liverpool, and was now cut off from recovering on the Bremen awards because of the fact of his making the agreement for arbitration of the same cotton at Liverpool. (Record, 72-77.)

In said first suit Heye, by supplemental petition, denied the allegations of the defendant and further pleaded that on receiving from the Birge-Forbes Co. the aforesaid letter of August 21, 1908, he understood it to insist only that in all future sales he was to make the sale contract so read that in arbitrations of the cotton the date

of the sale was to be looked to and not the last day of landing of the cargo, the other suggestion in the letter about applying differences made by Birge-Forbes Co.'s own sales being wholly impracticable; that he promptly wrote to the Birge-Forbes Co. and made known to that company his said interpretation of its letter; that said company acquiesced in and consented to said interpretation of its instructions; that plaintiff thereupon acted upon such interpretation and faithfully carried out the instructions as so understood during the remainder of the cotton season of 1908-1909 and during those of 1909-1910 and 1910-1911, all of which was known and acquiesced in by the defendant during all that time, whereby it was estopped from claiming now, after plaintiff had incurred the obligations resulting from the Bremen awards for the season of 1910-1911, that the said letter of August 21, 1908, should have been given by Heye a different meaning and application; that plaintiff, by his authorized agent, signed the Sherman agreement of January 27, 1911, providing for arbitration at Liverpool and for settlement between the parties according to the awards to be made in such new arbitration, but that said agreement 'proved to be impossible of performance in that it required the Liverpool arbitrators to arbitrate on the same grade and staple descriptions that the cotton concerned in this suit were sold upon in the Bremen market, and in proceeding with their arbitrations to apply the differences that were actually made for C. I. F. and six per cent cotton on the Liverpool market by buyers from Birges-Forbes Company and other American shippers on the very dates of the Bremen sales concerned in this suit, whereas after said agreement was made the fact developed that on the dates in question there were no transactions at Liverpool in the grade and staples of cotton to which the arbitrators were limited and hence that no basis existed upon which the Liverpool arbitrators could proceed; and consequently the arbitrators refused to proceed with the arbitration;" that by reason of the non-existence (unknown to the parties) at the time said agreement was made of the basis or condition necessary to its opera-

tion, such agreement never became a legal contract, but was null and void and the Bremen awards still remained in full force and effect; and that plaintiff, instead of preventing any arbitration at Liverpool as charged, did everything in his power to bring it about, and, not being at fault for the failure of the effort to arbtirate at Liverpool, was entitled to recover on the awards made at Bremen. (Record, 78-79.)

Said pleadings are lengthy, but the above is a correct and complete summary of them. It would be interesting to compare them with the pleadings in the present case and note the similarity of the issues made, but the point now under discussion concerns only what was involved in and determined by the first suit.

The oral charge of the court to the jury in said first suit was as follows:

"*Gentlemen*:

"The court has concluded, after hearing the argument of counsel in the cause, that it becomes my duty to direct a verdict. By so doing, of course I will relieve the jury of a very large amount of labor in going over the voluminous testimony and reaching such conclusion as you might reach from investigating the facts. I take this action in the case because I believe the whole case turns on questions of law which are for the decision of the court. For that reason I feel that I should direct the character of verdict you return, indicating the amount you should find in the case. In doing so, it may not be improper to make a very brief statement of the character and nature of the suit.

"This case was filed by the plaintiff, Carl R. Heye, based upon the claim that he had paid out something over seventy-six thousand dollars, or had become liable for that sum of money, on account of certain findings of the Bremen Board of Arbitration of the Bremen Cotton Exchange in ascertaining the differences in the staple, grade and quantity of certain cotton sold by him as the agent of the defendant company on the Bremen market. He claims that he

acted as the agent of the defendant company, and made sales of cotton between the 1st of October, 1910, and May 1, 1911. He alleges that it was agreed that the cotton he sold as the agent of the defendant company was to be sold under the rules of the Bremen Cotton Exchange, and, among those rules, was a stipulation that all differences as to grade and quality were to be arbitrated by the Board of Arbitrators provided for by the rules which have been introduced in evidence in this case. He claims that between the dates I have indicated, viz.: October 1, 1910, and May 1, 1911, something over fifteen thousand bales of cotton were sold by him as the agent of the defendant company to certain buyers in Bremen, Germany, and after the sales were made, reclamations were made by those buyers, and disputes and controversies arose as to the quality, grade and staple of the cotton, and that those disputes and controversies, under the rules of the Bremen Cotton Exchange, were submitted to the Board of Arbitrators; that those arbitrators acted in accordance with the rules of the Bremen Cotton Exchange and made their award; that thereafter that award was appealed from to the Board of Appeal, also provided for by the rules of the Bremen Cotton Exchange, and the Board of Appeal made its award, and that by virtue of these rules and these awards, he became liable to the buyers of the cotton in about the sum of $74,333.33. He alleges that, in addition to this item of award, he paid out on the cotton so sold for the defendant company the sum of $1,730.16 for losses and deficiencies in the weight of the cotton. As far as the latter sum, $1,730.16 is concerned, which the plaintiff alleges that he paid out for losses and deficiencies in the weight of the cotton, there is no controversy whatever in the testimony. The plaintiff alleges that he paid those amounts, and there is no testimony in behalf of the defendant company contradicting the evidence of the plaintiff on that point. Therefore, it would be my duty to instruct you to render a verdict for the

plaintiff, Heye, for the sum of $1,730.16, being the amount of losses and deficiencies in the weights of the cotton in controversy in this suit.

"As to the other part of the controversy, the defendant, Birge-Forbes Company, claims that it is not liable to the plaintiff for the amount of the awards for the reasons set out in its amended original answer filed in this case January 6, 1913. Without attempting to make an elaborate statement of the reasons set out in the answer the defense revolves around two propositions named in that answer. One of them is that the plaintiff, Heye, can not recover on the awards made by the Bremen Board of Arbitration, for the reason that on the 27th day of January, 1911, the findings of the Bremen Board of Arbitration were set aside and annulled by an agreement made between the parties to this suit on that date. The defendant alleges that it became dissatisfied with the findings of the Bremen Board of Arbitration, and that there were various negotiations between the defendant company and the plaintiff, Carl R. Heye, prior to the 27th of January, 1911, which culminated on that date in the agreement which has been read in evidence, and which is attached as an exhibit to the answer of the defendant company, and the defendant company claims that agreement amounted in law to a setting aside and annulling of the findings of the Bremen Board of Arbitration.

"It is in evidence that the agreement of January 27, 1911, was never carried out. The arbitrators who were agreed upon in that agreement of January 27, 1911, refused to act because of the fact, as is alleged that they claimed that there was not sufficient data upon which they could reach a conclusion at Liverpool, the place where the arbitration provided for in the agreement was to occur.

"There was some testimony one way and the other as to whether the plaintiff or the defendant company was chargeable with the blame for not carrying out the agreement of the 27th of January, 1911,

but I do not believe there is any testimony sufficient upon which to base a finding that either the plaintiff or the defendant company was at fault for failing to carry out that aggrement. In other words, it was an agreement attempted to be made to arbitrate which was never executed, and this through no fault of either of them as the court believes from the testimony.

"The question for the court to decide is whether the agreement of January 27, 1911, amounted to an abandonment and annullment of the findings of the Board of Arbitration and the Appeal Board of Arbitration.

"The court has come to the conclusion in this case that the plaintiff's cause of action rests upon the finding of the Board of Arbitration provided for by the rules of the Bremen Cotton Exchange; that that finding by the Board of Arbitration constituted his cause of action. If the Bremen Board of Arbitration had found nothing in favor of the parties to whom the cotton was sold, and who have claims for reclamation, then plaintiff would have nothing to pay and would have no cause of action against the defendant, so that the basis of this suit which constitutes his cause of action is that he had been compelled under the rules of the Bremen Cotton Exchange to pay out certain sums found against the defendant company by the Board of Arbitration of that Cotton Exchange.

"Now, when for any reason the agrement of January 27, 1911, failed to become operative, it remitted the plaintiff to his original cause of action which was the finding of the Bremen Board of Arbitration, and upon that he sues, and therefore the court is of opinion that the agreement of January 27, 1911, while it would have been effective, if it had been carried out, but not having been carried out, and without the fault of either party the plaintiff was remitted to his original cause of action, which is the finding of the Board of Arbirtation of the Bremen Cotton Exchange.

"The other proposition that was raised was that the rules of the Bremen Cotton Exchange were modified by the instructions given by the defendant company on the 21st day of August, 1908, together with the reply thereto made by the plaintiff on the 14th of September, 1908, and that the record may be as complete as possible on this particular phase of the case, I call the attention of the jury to the statements contained in the letter which the defendant company wrote to the plaintiff on the 21st of August, 1908, and which letter I quote in full as follows:

"Replying to yours of the 3rd inst., as you seem to think, you will be able to do a large business for us, and as our relations have always been very pleasant, we will drop the question of reducing expenses by employing an agent for the present, and continue our present relations for the coming season. However, it must be understood that you will push our sales as much as possible. We would like to have all sales made with the understanding that arbitration differences for grade and staple will be those in effect (the actual differences made on cif and six cotton sold by us) at the time of the sale instead of the last day of landing.'

"The defendant company had the right to engraft that change on the rules of the Bremen Cotton Exchange so far as the liabilities and obligations of the plaintiff in this case were concerned, if the proposition in that letter matured into a contract—that is, if the minds of the parties met as to that particular phase which the defendant company sought to engraft on the rules of the Bremen Cotton Exchange; so that the court must look to the testimony in the record to determine whether the minds of the parties met and agreed upon any change of the rules of the Bremen Cotton Exchange. Now, the letter of the defendant company of August 21, 1908, reached the plaintiff, and on September 14, 1908, the plaintiff replied to it, and I now quote his reply:

" 'Thanking you for your favor of August 21, I am glad to note that you are willing to continue our agreeable relations and beg to assure you once more I always shall use all ability and activity to push business, and to make same as extensive and satisfactory as possible.

" 'I note you wish it to be understood that all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future. However, I find it necessary to mention I fear we often shall meet some objections as to this condition, for Bremen buyers principally wish to buy exactly on Bremen rules. They are hard to be hand for any exceptions, nevertheless, I shall try and also in this point do my best for you. If, however, later on the resp. conditions shall prove to hinder business, I shall let you know.'

"The statement which the plaintiff appears to acquiesce in and agree to be bound by is the statement contained in this letter that ' all arbitrations buyers should demand are to be based on those grade and staple differences in force on date of sale, and I shall govern myself accordingly in future.'

"It is conceded in the argument in the case by the attorneys on both sides that subsequent to the writing of the letter of September 14, 1908, the arbitrations buyers did demand were based on those grade and staple differences in force on the date of the sale, and therefore whatever there was in the proposition contained in the letter of August 21, 1908, by the defendant company, and the reply in the letter of September 14, 1908, by the plaintiff has been carried out and complied with in the transactions which occurred between the parties subsequent to that date, and there is nothing in the finding of the Bremen Board of Arbitration of the Bremen Cotton Exchange which contravened that particular phase which the defendant company proposed and which the plaintiff accepted. They went

along subsequent to that time and arbitrated the differences under the rules of the Bremen Cotton Exchange, simply asking that one modification as contained in the request of the defendant company of August 21, 1908, and answered in the letter of plaintiff of September 14, 1908.

"This being so, the court is of opinion that the plaintiff in this case is entitled to recover not only the amount paid for the deficiencies in weight, but for whatever amount he paid as the guarantor of the defendant company's contract of sale with the buyers at Bremen. There is an issue in the case as to whether the plaintiff should recover the amount of $85,000.00 being the total amount of money which he paid and claims to be liable for plus the seventeen hundred and some odd dollars which he paid as deficiencies in weight, or whether the liability of the defendant company to the plaintiff is covered by the amount of money which he actually paid out on account of those contracts as such guarantor and surety.

"The court is of opinion that the measure of liability at present which the defendant company is under to the plaintiff is the amount of money he actually paid out, and not the amount of money which he may be liable to pay, but which has not yet been paid. It is undisputed that the amount of money he has paid out on account of the finding of the Board of Arbitration of the Bremen Cotton Exchange, and which has been in evidence to you, is $$36,610.96, and therefore I direct the jury to return a verdict in favor of the plaintiff for the sum of $1730.16 for deficiencies in weight, etc., of the cotton, and the further sum of $36,610.96 being the amount of the award of the Board of Arbitrators of the Bremen Cotton Exchange which the plaintiff has paid, and I have had prepared a verdict which I now read, and which some member of your body will sign as foreman.

"'We, the jury, under the direction of the court, find for the plaintiff in the sum of $1730.16 for deficiencies in weight, etc., of cotton, and the further sum of $36,610.96 being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two and 64/100 dollars.'" (Record, 82-86).

The above charge of the trial court, with one paragraph added, became the opinion of the Circuit Court of Appeals on writ of error. (*Birge-Forbes Co. vs. Heye*, 212 Fed., 112). A writ of certiorari was denied by the United States Supreme Court. (*Birge-Forbes Co. vs. Heye*, 234 U. S., 759, 58 L. Ed., 1580).

The judgment in said first case was as follows:

"On this 19th day of May, 1913, this cause came on to be heard, and both parties appeared and announced ready for trial. Then came a jury of twelve men, viz., H. H. Chestnutt and eleven others, who were duly impanelled and sworn to try the cause. After hearing the evidence and the arguments of counsel as to the law of the case, the court, on the 23rd day of May, 1913, directed a verdict, and thereupon the jury delivered in open court the following verdict, to-wit:

"'We, the jury, under directions of the court, find for the plaintiff in the sum of seventeen hundred and thirty and 16/100 dollars for deficiencies in weight, etc., of cotton, and the further sum of thirty-six thousand, six hundred and ten and 96/100 dollars, being the amount paid by the plaintiff on the awards made by the Bremen arbitrators upon the differences in the cotton as sold and that actually delivered at Bremen to the buyers at that place, together with six per cent interest per annum on both of said sums from May 1, 1911, amounting in the total to forty-three thousand and eighty-two

and 64/100 dollars. Sherman, Texas, May 23, 1913. H. H. Chestnutt, Foreman.'

"It is therefore considered and adjudged by the court, in pursuance of said verdict, that the plaintiff, Carl R. Heye, do have and recover of and from the defendant, the Birge-Forbes Company, a private corporation, the sum of forty-three thousand and eighty-two and 64/100 ($43,082.64) dollars, with interest thereon from this date at the rate of 6% per annum, said sum being the principal and interest of such parts of the liabilities alleged in plaintiff's pleadings to have been incurred by him as he has up to this time actually paid and as to which a cause of action in his favor against the defendant has already accrued. It is further considered and adjudged by the court that plaintiff recover of defendant all costs of this suit, and that he have his execution for the enforcement of this judgment." (Record, 86-87).

Following is that portion of the court's charge at the trial of the present suit that contains a discussion of the effect of the former judgment:

"*Gentlemen of the Jury*:

"At the conclusion of the evidence in this case, both the plaintiff and the defendant submitted motions asking for an instructed verdict, that is to say, the plaintiff submitted a motion asking me to instruct the jury to return a verdict in his favor for the amount of money claimed by him to be due him by the defendant, and the defendant company also submitted a motion asking me to instruct the jury to return a verdict in favor of it and against the plaintiff as to the entire amount sued for by the plaintiff. These motions were made orally, and after having submitted these motions, both sides have presented me, as liberally and as fully as they wished to, their arguments and reasons for making these two requests for an instructed verdict.

"It is the contention of the plaintiff that every issue in this case which goes to establish the lia-

bility of the defendant company to the plaintiff was adjudicated in a former trial between these parties which happened in the spring of 1913 in this court. The defendant company, in reply to that position, contends that none of the issues which go to the liability of the defendant company on the claims here sued for were adjudicated by that former judgment rendered in this court. It is the further contention of the defendant company that if they are wrong with reference to whether the liability of the defendant company to the plaintiff has been determined by the former adjudication of May, 1913, that under the laws which prevailed in the German Empire, the claim of the plaintiff against the defendant is barred by the statute of limitation, because, at the time he claims to have made the payment of the sums of money represented by German marks on the 6th day of May, 1914, and at the time that he gave the notes which express this sum previous to the date of payment, that the claims of those who had reclamations for cotton against the plaintiff, Heye, were barred under the statutes of the German Empire, and that therefore, when he paid the claims, it was a voluntary payment on his part, which was not binding on the defendant company.

"There is also, in the event I should determine the case in favor of the plaintiff, another contention as to what value should be given to a German mark in the ascertainment of the amount of the judgment to be rendered in dollars and cents, the plaintiff contending that the court has judicial knowledge of the fact that the German mark is worth 23 8/10c and the defendant company contending that at the date when this trial is occuring the value of the German mark has depreciated and is now worth only 18¼c.

"Of course, if the court should decide that the claims now presented for adjudication to the court, were not adjudicated in so far as the liability from the defendant company to the plaintiff is concerned,

then under the state of facts existing here, I would be compelled to render a judgment for the defendant, and there would be no occasion for me to determine the proposition as to whether the value of a German mark is 23 8/10c or 18⅛c. Furthermore, if the court should become convinced under the statutes which have been offered in evidence as to the periods of prescription and limitation which prevail in the German Empire, that the claims of the parties in Germany who asserted reclamations against the plaintiff, Carl R. Heye, were barred when he gave the notes and paid the debt, then in that event, the defendant here would not be liable and there would be no necessity for determining what is the value of the German mark in American coin, or ascertaining in any way what the equivalent of a German mark would be in dollars and cents.

"So you will observe from the statements made that these motions for instructed verdicts raise two vital issues. The first is as to whether the former judgment rendered in May, 1913, adjudicated the question of liability so far as the claims here sued on are concerned.

"The plaintiff has offered in evidence the pleadings, the charge of the court, the verdict of the jury, and the judgment that was rendered upon that verdict in this court on the 23rd day of May, 1913. These pleadings have been read, and it could serve no useful purpose to make a second incorporation of them in the record by reading them again, and I will therefore content myself with only alluding to them in a general way.

"These pleadings exhibit the fact that there was a former suit between these same parties growing out of the transactions that occurred between them beginning early in 1901 and running into 1911, and that that portion of the transactions which occurred between them with which this former suit concerned itself were those transactions between the

parties occurring between Oct., 1910, and the 1st of May, 1911. It was alleged in the petition of the plaintiff in the suit which culminated in the judgment of the 23rd of May, 1913, that the defendant company had by a contract and agreement between itself and the plaintiff constituted the plaintiff its selling agent in Bremen, Germany, to sell for it certain shipments of cotton. It was alleged that during the period in which the contract existed between the parties some 15,000 bales of cotton were shipped by the defendant company to the plaintiff, Carl R. Heye, at Bremen, German, to be sold by him as the agent of defendant. It was alleged that these sales were by the agreement of the parties to be made according to certain regulations existing on the Cotton Exchange in Bremen, and that among other features of those regulations it was provided that if there should be reclamations made by the German buyers from Carl R. Heye as the selling agent of the defendant company which grew out of any differences in the quality, grade and staple of the cotton sold by Carl R. Heye for the defendant company, that the ascertainment of the existence of such differences, as well as the ascertainment of the amount of money which such differences represented, was to be submitted to the Board of Arbitration of the Bremen Cotton Exchange. It was also alleged that growing out of these transactions from some time in Oct., 1910, to the 1st of May, 1911, the German buyers of the cotton shipped by the defendant company to the plaintiff Heye for sale by him as their agent, did make reclamations which amounted to $74,334.33, or 312,749.31 German marks, the latter amount being equivalent in German money to the former amount of American money. It was alleged that under the contract between these parties if either side should become dissatisfied with the finding of the Bremen Board of Arbitration of the Cotton Exchange at that place, that such party so dissatisfied should have the right

of appeal to what is denominated as the Appeal Board, which Appeal Board has the power to pass upon the fairness and regularity of the arbitration made by the first board which I have mentioned as the Arbitration Board of the Bremen Cotton Exchange. It is alleged in the original suit in 1913 that an appeal was taken from the Arbitration Board which found that the buyers of cotton in Germany which the defendant had shipped and sold through the plaintiff, Carl R. Heye, should be awarded 312,749.31 German marks as the amount to which they are entitled upon the failure of the cotton shipped by the defendant to reach the clasifications, grade and staple which the contract provided should characterize it. It is alleged that the finding of that Board of Arbitration was appealed from and the Appeal Board affirmed the fairness and justice of the award of the Board of Arbitration. And the plaintiff thereupon alleges that under the contract and the sales made according to the regulations prevailing upon the Cotton Exchange in Bremen, he was entitled to recover back from the defendant the value of the money that he had paid to the buyers of the cotton in Germany who had made the reclamations.

"Now the defendant resisted that contention of the plaintiff in the suit of May, 1913. The defendant denied that the cotton was to be sold according to the circumstances which I have just detailed, and the defendant further asserted that the arbitrations were unfair and unjust and that the awards were excessive and exorbitant and not expressive of the true condition of the contract as made; that the cotton was what it was represented to be and that therefore they were not liable to the plaintiff. They further alleged that there were circumstances which were to be understood and certain things which were to be performed by the plaintiff as their agent in order to fairly present their side of the issue to the Board of Arbitration of the Bremen Cotton Exchange and the Board of Appeal, and that plaintiff

failed to perform those things which the contract required of him, and which, if he had performed, would have shown in the particulars provided for in the rules of the Bremen Cotton Exchange that the cotton shipped by the defendant did come up to the contract under which it was shipped with regard to staple and character of fineness in every way, and, that plaintiff having failed to do his duty as the contract provided, and therefore having caused loss to the defendant, he ought not to be permitted to recover.

"It was further contended if there was an agreement that the cotton should be sold according to the rules prevailing on the Bremen Cotton Exchange, and even if the arbitrations were as provided for in the rules, that subsequent to the finding of the Bremen Board, and the affirmance of it by the Appeal Board, the plaintiff, Carl R. Heye, and the defendant company entered into a new agreement to arbitrate by which under certain provisions in that agreement the arbitration was to occur in Liverpool, England, and that therefore the plaintiff was not entitled to recover in the suit of May, 1913, for the reason that this arbitration was the one on which he must base his claim rather than the arbitration made by the Bremen Board according to the rules of the Bremen Cotton Exchange. That suit went to trial with those issues involved. It appeared at the trial according to the allegations in the pleadings in that suit, as well as in the allegations in the pleadings here and the proof introduced on that trial, that the amount of $74,334.33 claimed by the plaintiff had not been paid. That he had only paid a portion of the amount and that he brought his suit upon the idea that he was obliged to pay the balance of the $74,334.33, and when that fact appeared in the trial the court directed the jury to find for the plaintiff in that first suit only the amount he had actually paid, and thereby in effect determined that in that suit, not having paid the balance of the amount, he would be entitled to recover only the

amount he had paid. In other words, under the view of the case as taken by the court there, the plaintiff's right to recover the balance for which he sues at this time was practically an inchoate right and that the amount was not due according to the terms of the contract, and therefore plaintiff was not in a condition then, although he might have subsequently acquired the right to recover by having paid the balance of the money, to have his claim matured into a judgment. The court thereupon directed a verdict for the amount that judgment showed, which was the whole amount claimed by the plaintiff in that suit, less what the evidence and pleadings showed the plaintiff Heye at that time had not paid to the holders of the reclamation claims.

"Now the plaintiff Heye has brought this second suit which the pleadings show is to recover the amount found by the Board of Arbitration of the Bremen Cotton Exchange in his favor, less what was recovered by him against the defendant company in the suit of May 23rd, 1913. So that, the proposition to be decided here is whether the effect of the former judgment is conclusive against the defendant company as to the legality of the claims now sued on and the liability of the defendant company to pay them to the plaintiff. Upon the showing in this suit by the plaintiff that subsequent to the rendition of that judgment he had paid in money to the reclamation holders the entire amount of the reclamation claims not paid at the time the former suit went to judgment, the question now is whether or not as before stated the former judgment is conclusive as to the right of the plaintiff to recover in this suit. Both parties have presented to me decisions of the highest court in the land upholding the contentions they have made, and my investigation of the authorities has convinced me that there is no difference between these gentlemen as far as the law is concerned. This case is like many cases that are presented in the court room where the lawyers do not differ as to the law, but the differ-

ences become as wide as the two poles as to the application of the law. That seems to be the situation here. Neither side disputes the fact that the law produced by their respective adversaries is the law if it can apply to the facts of this case. I have examined the two decisions in the 94th volume of the U. S. Supreme Court Reports to which my attention was called in the argument, and I find that in Cyc. the same propositions covered by those two decisions are stated very succinctly and clearly and I believe by referring to them I can make my view of the law more understandable than by reading excerpts from the two cases in 94 U. S. I have on my desk the 23rd volume of Cyc which contains a very exhaustive article on the subject of judgments with a citation of authorities sustaining the text supplied by the writer of the article. At page 1215 I find this language:

"'A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein, so far as concerns the parties to that action and persons in privity with them, and can not be again litigated in any future action between such parties or privies, in the same court or in any other court of concurrent jurisdiction, upon the same or a different cause of action.'

"The next subdivision draws the distinction between the conclusiveness of a judgment and a bar created by the former recovery and uses this language:

"'A former judgment between the same parties is a bar to the maintenance of the second action only when the cause of action in the two suits are identical. But it will be conclusive and final as to any issue litigated and determined in the former suit, and coming in question in the second suit, although the latter is brought upon an entirely different cause of action.'

"Now I do not want to let pass out of my mind a proposition I think I am confronted with and that is

to decide whether the liability of the defendant company to the plaintiff was adjudicated by the judgment of May 23rd, 1913, in so far as the finding of the Board of Arbitration of the Bremen Cotton Exchange is concerned. That is, whether that judgment, which was duly appealed from and affirmed by the Circuit Court of Appeals, determined the question as between these parties of the liability of the defendant company to the plaintiff for the amounts for which reclamation claims were made by the German buyers; in other words, whether the liability of the defendant company to the plaintiff was ascertained and decided by the finding of the Bremen Board with respect to the cotton shipped during the season of 1910-1911, beginning some time in October, 1910, and ending May 1st, 1911, and whether the former judgment found that to be conclusive. As stated, the former case involved clearly under the pleadings whether the finding of the Bremen Board of Arbitration of Cotton Exchange was a binding finding as between the reclamation holders of claims and Carl R. Heye for which under the terms of the contract the defendant company was liable to the plaintiff. That issue was litigated, the plaintiff asserting in that case which matured into the judgment of May 23rd, 1913, that the finding of the Bremen Board was an arbitration by agreement which established the fact that the claims were valid and the amount which should be paid, the defendant company contending that the finding was invalid because unfairly made, and because the findings were excessive and exorbitant and because the plaintiff in those litigations before that board had not fairly represented the defendant company, and because subsequent to the finding of the board they had agreed upon a new arbitration. All these issues were presented in the original suit and determined adversely to the defendant company here.

"I call attention to one other passage on the subject which I have been discussing which appears on page 1298 of Cyc. I find this language:

"'Identity of the subject matter is not the true test to determine whether a judgment in one action is conclusive in another, although some of the cases have stated this as a general rule. It is undoubtedly true that a judgment is evidence in a second action between the same parties or their privies concerning the same subject matter as to all questions litigated and decided; that a former judgment can not operate as a bar to a second suit unless it concerns the same subject matter and is upon the same cause of action, and that the estoppel of a judgment, whatever may be its extent as between the parties, is confined, as to their privies, to the particular subject of the litigation. But still it is a well settled rule that the judgment of a court of competent jurisdiction on a question directly involved in the suit is conclusive in a second suit between the same parties, where the same question comes again in issue, although the second action relates to a different subject matter. Thus the former judgment will be an estoppel where the same question or issue, depending on the same transaction or state of facts, arises also in the second suit, although in relation to different right or different property, but not where the question in the second suit, although similar to that in the first, grows out of a different transaction or state of facts, nor where the second action, although relating to the same subject matter, is between different parties, or grows out of the same subject matter, but involves a different question or claim in regard to it.'

"Furthermore:

"'The true test is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon its determination, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not. Or as the rule is otherwise stated, in a second action between the same parties on a demand different from that in

the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first.'

"Then skipping a paragraph, I find this rule given:

" 'The general rule is that a judgment is conclusive for the purposes of a second action between the same parties or their parties, of all facts, questions, or claims which were directly in issue and adjudicated, whether the second suit be upon the same or a different cause of action.'

"Now I think the distinction made by the text there is clear and can be easily ascertained as to how it should be applied in this case. There is no doubt but that in the first case which went to judgment on the 23rd of May, 1913, the plaintiff here, who was the plaintiff there, sought to recover from the defendant for the very claims which he seeks to recover now and that the result of the trial which failed to give him the recovery he seeks in this suit was occasioned because of the fact that he had not paid at that time the claims now sued on and which were presented in that trial, and which have subsequent to that judgment been paid. So that the vital issue was decided in the first trial—that is that the defendant was liable to the plaintiff under the contract between them for all reclamation claims found by the Board of Arbitration of the Bremen Cotton Exchange for cotton sold by plaintiff as agent of defendant, that is, the finding of the Bremen Board established the validity of the claims. But I held in the former trial that Heye could not recover from the defendant company then simply because he was liable to pay the reclamation claim

holders; that his right to recover must be limited to the amount he had actually paid to the claim holders, and that was why the judgment was rendered for the sum it was and not for the full amount sued for.

"Now in this case I think the pleadings and evidence established the fact that this is a suit to recover on the part of the same plaintiff from the same defendant company the amount of reclamation claims Heye had not paid when the first suit went to judgment and which he has since paid. That can be very plainly established in my mind from an inspection of the testimony in the record and that portion of it upon which there is no dispute. Certain interrogatories were propounded to the plaintiff by his counsel and among them was interrogatory 2nd which reads as follows:

" 'Referring to the arbitration allowances made against the Birge-Forbes Company in favor of certain European buyers on account of cotton sold them at Bremen through you as selling agent during the cotton season of 1910-1911, and referring to the first suit brought by you against the Birge-Forbes Company based upon said claims, which suit went to judgment in this court on May 23rd, 1913, please state whether or not you ever paid to the European purchasers the remaining sums due them that you had not actually paid at the time of the trial of said first suit.'

"This interrogatory very plainly asked him whether since the judgment of May 23rd, 1913, he had completed the payment of the claims held by the reclamation claim holders growing out of the failure of the cotton shipped to come up in quality, grade and staple to what it was represented to be. His answer is as follows:

" 'In answer to interrogatory II the witness says: I state that I paid to the European purchasers of the Birge-Forbes Company's shipments during the cotton season of 1910-1911, all remaining sums still

due them when judgment was given in my favor for the first part of this suit on May 23rd, 1913.'

"The answer to the next interrogatory sets out the parties to whom payments were made.

"The deposition of the witness, Oscar Polletin, discloses the fact that he held what was called a power of attorney from the plaintiff, Carl R. Heye. The scope of his power does not appear in the evidence. I think it must have been something like General Manager of the business of Heye. He sets out exhibits from the books of the plaintiff, Carl R. Heye, which show that those payments were made and that they were made first by giving Heye's notes to the holders of the claims and afterwards the notes were taken up by the payment of cash by Carl R. Heye to those holders, and that this was done on the 6th of May, 1914. So that I feel like under the state of the law as the court conceives it to be as applied to the evidence in this case that the liability of the defendant company on the claims sued for here was adjudicated in the former judgment between these same parties in this court which judgment was rendered on the 23rd of May, 1913." (Record 104-111).

AUTHORITIES

Railway Co. vs. United States, 168 U. S. 1, 42 L. Ed., 355.

New Orleans vs. Bank, 167, U. S. 371, 42 L. Ed., 202.

Mason Lumber Co. vs. Buchtel, 101 U. S. 638, 25 L. Ed. 1072.

Johnson Co. vs. Wharton, 152 U. S., 253, 38 L. Ed. 430.

Mining Co. vs. Mining Co., 157 U. S. 683, 39 L. Ed., 859.

Town of Beloit vs. Morgan, 7 Wall. 619, 19 L. Ed., 205.

Hanrick vs. Gurley, 93 Tex., 458.

Webster vs. Mann, 56 Tex., 119.

23 Cyc., 1288, 1294, 1295, 1306, 1322.
Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316, 40 L. Ed., 712.
Harshman vs. Knox County, 122 U. S., 306, 30 L. Ed., 1152.
Life Insurance Co. vs. Bangs, 103 U. S., 780, 26 L. Ed., 608.
Railway Co. vs. Fraloff, 100 U. S., 24, 25 L. Ed., 531.
2 Foster on Federal Practice (5th Ed.), p. 1556.

The verdict and judgment at the first trial between these parties established the complete validity of the Bremen awards as a whole, and the fact that such awards bound the Birge-Forbes Company as principal and Heye as guarantor to pay the sums they called for, whatever such sums might be. It is immaterial whether we say that said verdict and judgment found the aggregate amount of the awards to be $74,820.52, though in fact that was the undisputed amount. The main and important fact is that the verdict and judgment adjudged the awards to be valid in their entirety, and without distinction between different awards or different portions of the same award, and then at the last trial plaintiff proved conclusively what sum said awards amounted to and that since the other trial he had finished paying them off.

In *Ry. Co. vs. U. S.*, 168 U. S. 1, it was decided that a judgment holding certain railroad maps required to be made under a grant from the Government to be sufficient and valid was binding upon that question in another suit between the same parties concerning land not involved in the first suit but dependent for its title upon the same maps. We beg to quote from the opinion the following excellent discussion of the doctrine of *res adjudicata*:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot

be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

* * * * * * * * * * * * *

"The latest expressions of opinion by this court on this question are in *Last Chance Mining Co. vs. Tyler Mining Co.*, 157 U. S., 683, 691, (39:859, 863), and *New Orleans vs. Citizens' Bank*, 167 U. S., 371, 396. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the boundaries of certain minnig claims alleged to have been legally located and to belong to the former company, precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located—the court observing that a judgment by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest, the essence of estoppel by judgment being that 'there has been a judicial determination of a fact,

and the question always is, Has there been such a determination? and not, Upon what evidence or by what means was it reached?"

"In *New Orleans vs. Citizens' Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue duly raised by the pleadings whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: 'The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends as, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies.'"

In 23 Cyc., 1288, we find this language:

"A judgment rendered by a court having jurisdiction of the parties and subject matter, whether correct or not, is conclusive and indisputable evidence as to all the points or questions in issue in the suit and actually adjudicated therein, when the same comes again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action, in so far as it settles and determines questions of fact as distinguished from abstract propositions of law."

We quote from p. 1294 of the same book:

"A decision adjudging a conveyance, contract, or other instrument to be fraudulent or invalid is conclusive of that fact in all further litigation between the same parties; and on the other hand, a judgment giving effect to a deed, mortgage, judgment, or contract is conclusive evidence that it is free from fraud or illegality, even though that issue was not raised in the action, since in that case the judgment necessarily implies a finding that the cause of

action was valid and enforceable, except where the party objecting was ignorant of the fraud or illegality before the judgment, or was prevented from pleading it."

The same author says, at p. 1295:

"Where a series of actions are brought for installments due under a contract, or successive actions on a continuing or recurring cause, an adjudication in the first action on the fundamental state of facts on which they all rest will be conclusive in the rest, precluding inquiry into such ultimate facts or grounds of recovery."

The "fundamental state of facts" on which both of Heye's suits rested was that the Bremen awards were free from illegality, unfairness and all the other infirmities with which they were charged and were valid and binding upon the parties. The first judgment was impossible without a finding to that effect. Hence in the present suit the defendant is precluded from making inquiry into such "ultimate fact and ground of recovery."

Again we quote from 23 Cyc., p. 1306:

"Matters which follow by necessary and inevitable inference from the judgment—findings or determinations of the court in relation to the subject matter of the suit which are necessarily implied from its final decision, as being determinations which it must have made in order to justify the judgment as rendered—are equally covered by the estopped as if they were specifically found in so many words; or, in other words, it is allowable to reason back from the judgment to the basis on which it stands, and, regarding the judgment as a conclusion, and finding it to be one which could have been drawn only from certain premises, the premises are equally *res adjudicata* with the conclusion itself."

If "it is allowable to reason back from the judgment to the basis on which it stands," it is impossible to escape the conclusion that the Bremen awards were all valid.

Also in 23 Cyc., p. 1322, the following language is used:

> "When the validity of a contract is adjudicated in an action upon it, either in the sense of being necessarily determined by a judgment enforcing the contract, or by being put in issue and tried, the question is conclusively settled by the judgment, for the purposes of all further litigation between the parties, as in actions for further installments due under the contract; and conversely if the contract is once adjudged invalid it cannot be sustained in a second action between the same parties."

In *Town of Beloit vs. Morgan*, 7 Wall., 61, the holder of certain bonds of the town had recovered judgment on them and afterwards the town brought a bill in equity against him to enjoin him from suing upon, and to require him to surrender up for cancellation, other bonds issued under the same statute and for the same purpose. The Supreme Court held that the validity of all the bonds had been conclusively established by the former judgment and could not be again questioned in any form. Note the following excerpt from the opinion:

> "On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject matter, though the *res* itself may be different.
>
> "An apt illustration of this principle is found in *Gardner vs. Buckbee*, 3 Cow., 120. Gardner bought a vessel from Buckbee, and gave two notes for the purchase money. Buckbee sued him upon one of

the notes in the Marine Court. Gardner set up as defense, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchaud vs. Diaz*, 3 Den., 238; *Doty vs. Brown*, 4 N. Y., 71, and *Babcock vs. Camp*, 12 Ohio St., 11, are to the same effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. (Cites several authorities). But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented.

"In *Henderson vs. Henderson*, 1 Hare, 115, the Vice-Chancellor said: 'In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same trans-

action. *Brandernagle vs. Cocks*, 19 Wend., 207. The judgment at law established conclusively the original validity of the securities described in the bill, and the liability of the town to pay them. Nothing is disclosed in the case which affects this condition of things."

In *Harshman vs. Knox County*, 122 U. S., 306, the court quoted with approval the following language from *Burlen vs. Shannon*, 99 Mass., 200:

> "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded."

In the case of *Insurance Co. vs. Bangs*, 203 U. S., 780, a judgment had been recovered upon two life insurance policies in an action at law, and thereafter the insurance company brought a bill in equity to enjoin the enforcement of said judgment and to cancel the policies because of an alleged conspiracy to rob the insurance company and of suicide by the assured in pursuance of such conspiracy. These were matters that could have been urged in defense of the suit at law, and the court held that the complainant in the bill was estopped by the former adjudication. In the opinion the court said:

> "Aside from this, the judgment in the action at law was a bar to this suit. Its recovery concluded all matters which might have been urged as a defense to the policies. A fraudulent purpose in procuring them, subsequently carried into execution, would have been a good defense. It was in fact originally pleaded and afterwards withdrawn. Its withdrawal did not authorize a suit in another forum for its establishment against the demand of the plaintiff. When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or release or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by

reason of any admissible matter which might have been offered to defeat the action."

Applying the above decision in the instant case, the first recovery by Heye is an answer to all future assertions of the invalidity of the Bremen awards, because all defenses presented in the last suit were either urged in the first suit or were available then and should have been urged.

In *Webster vs. Mann*, 56 Tex., 119, it was decided that a deed held valid in one suit could not be questioned in a second suit between the same parties or their privies, involving the title to town lots not included in the first suit but conveyed by the same deed. The Supreme Court of Texas, by Judge Stayton, said:

> "The validity of that deed, in any event, was in issue in the case between the appellants and Baker as to lot 12; in fact, that was the main issue in the case; hence, even if Mann's title to lots 8, 9, 10 and 11 was not actually passed upon by the jury, the judgment rendered would be as conclusive of his right to that property as if it had been so passed upon; for there is no question that in so far as lot 12 was concerned, title to it, through the deed of Betsy Webster to Baker, was directly in issue. This issue depended solely upon the question of the validity of the deed, and that having been found in favor of the appellees, must be held conclusive as to all the property that passed thereby, or which by its terms purported to pass thereby, and such judgment must, unless reversed or in some manner set aside, operate as a conclusive bar to any claim by Betsy Webster's heirs for any of the property named in the deed. *San Antonio vs. Lewis*, 32 Tex., 411; *Lewis vs. San Antonio*, 26 Tex., 319; *Aurora vs. West*, 7 Wall., 97; *Beloit vs. Morgan*, 7 Wall., 619."

That the pleadings, charge, and other parts of the record in the first suit between Heye and the Birge-Forbes Co. could be looked to for the purpose of ascertaining what was involved in and determined by the adjudication is settled by numerous decisions of the U.

S. Supreme Court. An illustration of this rule is found in the case of *Washington Gas Light Co. vs. Dist. of Columbia*, 161 U. S., 316, wherein it was said:

> "The elementary rule is that, for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

Furthermore, the trial court's finding in the present case that the validity of the Bremen awards in their entirety was an issue in the first suit and conclusively determined therein seems to be a finding on a mixed matter of law and fact and therefore not reviewable in the appellate courts unless it is clear to this court that such finding is wholly without support in the record. The case of *Railway Co. vs. Fraloff*, 100 U. S., 24, involved a dispute as to whether certain articles belonging to a passenger really constituted baggage as claimed. Note the following excerpts from the opinion:

> "Whether they were such articles, in quantity and value, as passengers of like station and under like circumstances ordinarily or usually carry for their personal use, and to subserve their convenience, gratification or comfort while traveling, was not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance from the court as to the law governing such cases."
>
> "No error of law appearing upon the record, this court cannot reverse the judgment, because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influences or bias, the remedy, therefore, rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict and over-

ruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties."

In this connection it should be remembered that at the trial of the present case both sides moved for a directed verdict (Court's Charge, Record, p. 104) and did not ask that any issue of fact be sent to the jury, thereby consenting for the court to determine the question of fact and thereby authorizing us to substitute "trial court" for "jury" in the above quotations from *Railway Co. vs. Fraloff*. See 2 *Foster on Federal Practice* (5th Ed.), p. 1556, where the author says:

"When both parties move for a direction of a verdict, that is a submission of the facts to the court for decision and its finding is conclusive; unless there is no evidence as to a fact essential to support the judgment, but not where a party moved in the alternative either for a verdict in his favor, or, in case that were denied, that he might have leave to go to the jury. After such a motion has been decided, it is too late for the unsuccessful party whose motion for a direction has been denied to ask leave to go to the jury."

We have carefully read the decisions cited and discussed by plaintiff in error upon the question of *res adjudicata*, and in our judgment none of them gives any support to plaintiff in error's position in this case.

Russell vs. Place, 94 U. S., 606, is merely an illustration of the familiar rule that, where there are two counts in a declaration or two distinct grounds of recovery alleged, either one of which is sufficient to support the relief sought, and a recovery is had, such recovery does not operate as an estoppel in subsequent litigation when it does not appear from the record of the former judgment or otherwise that the recovery was based upon both

grounds, or, if upon one only, which one. In *Russell vs. Place,* the former recovery was had in an action for damages for infringement of a patent, which had two claims, both of which were pleaded. The judgment was general and failed to show that both claims were established and also failed to show which one was established. Neither was the matter made definite by proof at the subsequent trial in which this judgment was relied upon as an estoppel. No further comment is necessary to show the broad distinction between that case and the one now before the court.

Langdon vs. Clark, 221 Fed., 841, is cited by plaintiff in error, but we could scarcely wish for a better authority in support of our position, as will appear from the following quotation from p. 847:

> "Certainly it cannot be claimed that any of the several findings as to the title made by the trial court in the former action, other than that relating to the title to the tract of 8.7 acres, was necessary to the decision of the question involved. A judgment could have been rendered and the bill dismissed, without reference to whether or not title as to the other portions of the lake was or was not in the defendant in that action. If, however, the record disclosed that title to the tract of 8.7 acres had been derived from the same common source, and had been dependent upon the existence or non-existence of the same fact or facts as the title to the remaining tracts, then the finding as to the title to the tract of 8.7 acres would have been conclusive as to the whole. See *Southern Pacific Railroad vs. United States,* 168 U. S., 1; 54 Sup. Ct., 18, 42 L. Ed., 355 (1897). But the title to the 8.7 acres evidently involved a question distinct from that involved as to other portions of the defendant's land."

The cases of *In Re. Wm. S. Butler & Co.,* 270 Fed., 705, and *Smith vs. Mosier,* 169 Fed., 430, are in our opinion, so clearly irrelevant that comment is unnecessary.

An inspection of Exhibits A and B attached to Heye's petition in the trial court, and printed on pages 11 to

17 of the Record sent up to the Circuit Court of Appeals, and an inspection of Exhibit C. C. attached to the depositions of Oscar Polletin and printed on the sheet between pages 94 and 95 of said Record, will show that, with the exception of awards to a small amount made in favor of Lesser & Co. and C. A. Cruner & Co., which appear to have been completely extinguished by the payments made by Heye before judgment was had in his first suit against the Birge-Forbes Co., every award recovered on in the first suit was also recovered on in the present suit. In other words, with the two exceptions noted, the payments by virtue of which Heye obtained his first recovery were partial payments and were spread over all the awards without extinguishing any of them; and the balances due on the same identical awards remained unsatisfied until May 6th, 1914, when Heye made his final payment, the one on which the present judgment is based. Thus it conclusively appears that every award recovered upon in the present suit was adjudged valid and made the basis of a part of the recovery in the other suit.

QUESTION OF LIMITATION.

The court was well warranted in finding that the reclamation claims, which, when established by arbitration at Bremen, Heye became liable for as guarantor and afterwards paid, were not barred by limitation at the time he paid them; and, moreover, such finding involved a matter of fact not reviewable on writ of error.

The only allegations made by the defendant in the way of a plea of limitation, or on the subject of limitation, were as follows:

> "Even if it were true that said transaction was intended as a payment of any demands against the defendant, which is not admitted but expressly denied, then the same was entirely voluntary on the part of the plaintiff because if said parties had any cause of action whatever against this defendant, which is not admitted, the same were barred by two years statute of limitation when paid by

plaintiff, if said scheme can be said to be a payment, more than two years having expired after the accrual of their various causes of action before the alleged payment was made. (Record, pp. 26-27).

"Defendant further avers that if it is true that plaintiff has made the payments alleged, which it expressly denies, he made the same voluntarily, and not because he was bound therefor as guarantor or surety of defendant. Both plaintiff and each and all of said buyers, or persons to whom he claims he made such payments, reside in Germany, and under the laws of Germany, which defendant here pleads, each and all of said alleged claims and alleged awards were barred by limitation two years after the making of such awards, and that if the plaintiff has made such payments, as he alleges, he made the same long after the expiration of two years and at a time when the same were barred by limitation under the laws of Germany against both the plaintiff and against this defendant, and when he was under no legal obligation to make the same." (Record, p. 28).

Geo. C. Butte, a professor of law in the University of Texas, who had studied law in the universities of Berlin and Heidelberg a few years ago, but had never been a practitioner in Germany, was called as a witness by the defendant in an effort to establish its limitation plea. He produced a copy of the German Civil Code, printed in German, and read from it Sec. 477, translating the same into English as follows:

"The claim of the buyer for recission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is out-lawed in so far as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from the delivery of the goods; in the case of real estate in one year from the transfer of possession. This limitation period can be extended by agreement." (Record, p. 92).

It was his opinion that this provision applied under the circumstances of this case, and that the claims of the Bremen buyers of the Birge-Forbes cotton were outlawed in six months from the date of the delivery of the cotton. On cross-examination, he said:

> "There is no provision in the German code in regard to the period of limitation in case claims have been adjudicated by arbitration by a board such as the Bremen Cotton Exchange." (Record, p. 93).

In another part of his cross-examination he changed his testimony as to when limitation would begin to run by saying it would begin from the first day of January next following delivery of the cotton. This is his language on that point:

> "The statute says that the limitation period is six months from the delivery of the goods and that has been construed to mean from the first of January next following. That is a matter of construction." (Record, p. 94).

On the question as to what sort of acknowledgement or new promise was necessary under the law of Germany to arrest the running of limitation, he said:

> "A written acknowledgement of a debt, if the contract is such as must be in writing, or oral, if the contract is such as may be made in parol, would suspend the running of the statute. Where the contract is in writing or where the contract is required to be in writing the acknowledgement of the debt must be in writing. Whether the contract is in writing or oral, if it is one that might be made orally and still be valid under the law, then an oral acknowledgment is good to control the statute of limitation." (Record, p. 94).

But Sec. 208 of the German Civil Code (the following translation of which Prof. Butte agreed was correct), reads:

> "Prescription is interrupted if the obligator acknowledges the claim towards the obligee by part

payment, payment of interest, giving of security, or any other manner." (Record, p. 98.)

After the attorneys had finished with the witness, the court examined him as follows:

Question by the court:

"Now if one party sells to another party personal property and guarantees or represents it to be of certain quality, and under certain conditions, and the buyer on receipt of the property from the seller discovers that it is inferior in grade and quality, that, under our system, would give to the buyer a cause of action which we sometimes denominate as an action for unliquidated damages. Do they have any similar action of that kind in Germany?"

Answer:

"No, sir; the buyer has the remedies I have indicated. They do not in Germany have actions of that kind for unliquidated damages."

Question by the court:

"Suppose the parties to the transaction for the purchase and sale of personal property, realizing that there may be differences of opinion between them as to whether the property sold by the seller to the buyer comes up to and fulfills the warranties given by the seller to the buyer, realizing that there may be differences upon that subject, they have agreed between themselves that they will constitute a certain number of men, I don't care what you call them, but a certain designated number of men they agree to constitute the proper persons to be clothed with the authority as between the buyer and seller to estimate, determine and fix by their judgment—and I mean by judgment as distinguished from the judgment of a court—their opinion, the real amount of money which represents the difference between what the seller sold the buyer and what was delivered to the buyer under the contract and that body ascertains that amount, now

then, under those circumstances, when does limitation begin to run, from the time the goods were received by the buyer or from the time the duly constituted tribunal fixes the liability?"

Answer:

"It does not change the running of the statute. There is a special provision in the law that the buyer may accept the goods knowing of the defect and he has the same remedies as if he did not know of the defect at the time he accepted the goods, provided he makes a reservation that he accepts them subject to reclamation for the defect. I take the agreement as equivalent to a reservation between the parties at the time of the acceptance of the goods."

Question by the court:

"The parties have agreed that certain individuals, three or more, shall hear the statements from both sides and determine how much money it takes to express the failure of the goods to reach the warranty under which the seller sold, when does the limitation begin to run, from the time when the goods were sold, or the time when the parties through their duly constituted authority received the information as to the amount of money which would represent the failure of the goods to come up to the representations and warranties?"

Answer:

"It would run from the time of the delivery of the goods."

Question by the court:

"Suppose these appraisers whom the parties have agreed upon to investigate the matter and determine how much damage was occasioned to the buyer by the failure of the seller to send goods corresponding to his warranties should be engaged in their deliberations longer than six months, would the claim be barred?"

Answer:

"Yes, sir; because their finding is merely a finding of fact. It creates no additional liability between the parties beyond that which grows out of the contract of sale. These appraising commissions are very common in Germany. The appraisers are experts and their findings are not to be taken as arbitral awards but findings of fact binding on the parties. The party who feels himself aggrieved in a transaction of that kind must see to it that the finding of the appraisers is made within the period of six months, so that in the event the other party fails to pay what the appraisers find to be due, he must bring his suit within six months, and then the finding of fact of the appraisers can not be challenged." (Record, pp. 94-96).

Plaintiff introduced the following sections of the German Civil Code:

"195. The regular period of prescription is 30 years."

"202. Prescription is suspended so long as the performance is stayed or the obligor is temporarily entitled on any other ground to refuse performance. This provision does not apply to the pleas of right of lien, or unperformed contract, of absense of security or of *beneficium excussionis*, nor to the pleas available to a surety as provided for by 770 and to an heir as provided for by 2014, 2015."

"208. Prescription is interrupted if the obligor acknowledges the claim toward the obligee by part payment, payment of interest, giving of security, or in any other manner."

"218. A claim established by a non-appealable judgment is barred by prescription in 30 years even if it is itself subject to a shorter period of prescription. The same rule applies to a claim arising from an executory compromise or an executory deed, and a claim becoming executory to settlement in bankruptcy proceedings. Insofar as the settlement relates to periodical payments be-

coming due only in the future the shorter period of prescription is sufficient."

"220. If a claim is required to be enforced before a court of arbitration or a special tribunal, before an administrative court or an administrative authority, the provisions of 209 to 213, 215, 216, 218, 219 apply *mutadis mutandis*. If the arbitrators are not nominated in the agreement as to arbitration, or if any arbitrator is necessary for any other reason, or if the court of arbitration can not be invoked until after the fulfillment of some other condition, the prescription is already interrupted by the obligee taking the steps necessary on his part for the settlement of the matters." (Record, p. 99).

Plaintiff moved the court to strike out and exclude the testimony of the witness, George C. Butte, concerning said Sec. 477, and the alleged six months period of limitation, on the ground that there was a fatal variance between defendant's allegations and its evidence on the subject of limitation, in that the statute pleaded would outlaw the claim at the end of two years from the date of the arbitration award, whereas the statute proved would (if applicable at all) outlaw the claim at the end of six months from the date of delivery of the cotton, or else at the end of six months from January 1st next after such delivery (the witness having stated it both ways). The court took this motion under advisement, but did not find it necessary to act upon it. (Record, p. 98).

All that part of the court's charge that dealt with the limitation question is here quoted in full:

"That leaves another question in the case which is the question of limitation. That is as to whether under the laws that prevailed in the German Empire this claim of the plaintiff, Carl R. Heye, can be enforced against the defendant company here. Or, to state the matter a little more literally, the question is whether when Heye paid to the German buyers their reclamation claims those claims as to

Heye were barred, or as to the defendant company were barred by the statutes of limitation that prevailed in the German Empire. In other words, it is the contention of the defendant that when Heye made the payments to the reclamation claim holders, he was under no legal obligation to do so however great his moral obligation may have been, and that the payments were made voluntarily and therefore created no obligation on the defendant company to reimburse him. My attention has been called on this proposition to some sections of a book, which has been admitted to be correct, translating certain parts of the prescription or limitation laws of Germany. In order that the book may be identified, I will state in this connection that it calls itself 'The German Civil Code' and purports to have been translated and annotated by a Mr. Wang. My attention has been celled to Section 477 of this German Civil Code, which reads as follws:

> " 'The claim for cancellation or reduction and the claim for compensation on account of the absence of a promised quality are barred by prescription, unless the seller has fraudulently concealed the defects, in the case of movables in six months after delivery; in the case of land in one year after the transfer. The period of prescription may be extended by contract.'

"Now, in my opinion, if this suit had been brought without any of the circumstances which surrounded the transaction between the parties, Section 477 of the German Civil Code would have barred the holders of the reclamation claims from obtaining anything on account of the failure of the cotton purchased by them to come up to contract representations as to quality, grade and staple. I think it is manifest that the enactment of this statute was intended to permit a speedy adjustment of those claims where there was a failure of an article sold by one person to another in Germany to come up to the promised quality of the article so sold; that is, while the

matter is fresh in their minds and while the controversy is new, if it is then decided, it will be more apt to be a proper and just ascertainment than if delayed. Therefore, I am convinced under ordinary circumstances that if these reclamation claim holders had undertaken to establish their claims more than six months after the delivery of the cotton, Section 477 would have defeated a recovery if applied. That is not the situation here. These people had in advance some idea that there would be differences in judgment as to whether the cotton sold would come up to the cotton contracted for in quality, grade and staple, and they entered into an agreement which, as far as I am able to say, they had a right to enter into committing the decision of that matter to the Board of Arbitration of the Bremen Cotton Exchange. They both signed it and agreed to it, and for a long period of years all their transactions were regulated by it. It seems that no controversy arose between them until the end of the cotton season of 1910-1911. If prior to the controversy in this suit a dispute had arisen between them this record fails to disclose it. Then this controversy came up in which the findings of the Board of Arbitration of the Bremen Cotton Exchange were objected to. An appeal was taken from the finding of that board and the finding of the board was affirmed. So that, when the Board of Arbitration of the Bremen Cotton Exchange found that the cotton sold by the Birge-Forbes Company to the German buyers through their agent, Carl R. Heye, failed to correspond in quality, grade and staple to the cotton bought by these buyers, and found that a certain amount of money should be paid by Heye, acting in the sale as the agent of the defendant company and those findings of the board were affirmed by the Board of Appeals, then it was no longer, in the judgment of the court, a claim for compensation on account of the absense of promised quality in the thing sold, but became like any other claim, an ascertained and determined demand, fixed in its amount and absolute

in its obligation. And therefore the court is of the opinion that under these circumstances the six months statute does not apply and the court is of the further opinion that the claim of the plaintiff is not barred by any statute of limitation, and that plaintiff has a right to recover, and it is my duty to direct a verdict in favor of the plaintiff." (Record, pp. 111-113).

AUTHORITIES.

Dainese vs. Hale, 91 U. S., 13; 23 L. Ed., 190.
Hudson River Pulp & Paper Co. vs. Warner & Co., (C. C. A.), 99 Fed., 187.
Eastern Bldg. & Loan Ass'n vs. Ebaugh, 185 U. S., 114; 46 L. Ed., 830.
Coram vs. Davis (Mass.), 103 N. E., 1027.
4 Corp. Jur., pp. 644-647, 843-844.
Railway Co. vs. Phillips (C. C. A.), 196 Fed., 328.
Railway Co. vs. Fraloff, 100 U. S., 24; 25 L. Ed., 531.
2 Foster on Federal Practice (5th Ed.), p. 1556.
2 Jones on Evidence, sec. 390-391.
3 Bouvier's Law Dictionary, 3325.
Sena vs. American Turquoise Co., 220 U. S., 479; 55 L. Ed., 559.
Melton vs. Trust Co. (C. C. A.), 190 Fed., 126.

Of course, the burden of proof was upon the defendant to establish his plea of limitation. And on writ of error the presumptions are in favor of the correctness of what was done by the trial court.

The court might well have stricken out the defendant's evidence on the subject of limitation, because it was utterly at variance with the allegations. Having pleaded only a statute of Germany that would outlaw the claim in two years from the date of the arbitration awards, defendant offered no evidence whatever tending to support that allegation, but attempted to prove there was a German statute which would outlaw the claim in six months after the delivery of the cotton. Can a more striking contrast between allega-

tions and evidence be imagined? See in this connection *Ware vs. Shafer*, 88 Tex., 44; 29 S. W., 756; *Railway Co. vs. Poole*, 104 Tex., 36; 133 S. W.; *Ennis vs. Cooke*, 2 2 Tex., 592. In the first named case the court said:

> "The object of pleading is to notify the opposite party of what it is expected to prove as the ground of plaintiff's action, or the defendant's defense, so that he may prepare for the trial of the issues thus tendered. *Lemmon vs. Hanley*, 28 Tex., 220). To determine whether or not a pleading presents a certain issue, it is a safe rule to look at the pleading from the standpoint of the party against whom it is exhibited, and ascertain if the allegations are sufficient to notify him that the evidence offered will be produced, or that he will be called upon to present evidence to meet it."

It is familiar law that appellate courts (even where they possess the right to review findings of fact) will defer greatly to the opinion of a jury or trial court on such matters because of the latter's superior opportunities to "size up" the witnesses and give their testimony such weight, and only such weight, as it may be justly entitled to. And of course this rule applies to expert witnesses the same as to others. Indeed it has often been remarked by the courts that expert testimony is to be received with caution and subjected to close scrutiny. (2 *Jones on Evidence*, sec. 390-391).

Without desiring to criticise unduly the testimony of Prof. Butte, we nevertheless feel that the court was fully justified in practically rejecting his aid in interpreting the limitation laws of Germany.

Prof. Butte first said there was a provision in the German Code prescribing a limitation period of six months from date of delivery of the goods, which applied to the claim involved in this suit, and that such provision applied regardless of the necessity for or fact of arbitration proceedings to settle the amount of the claim. Then on cross-examination he said:

> "There is no provision in the German Code in regard to the period of limitation in case claims

have been adjudicated by arbitration by a board such as the Bremen Cotton Exchange." (Record, p. 93).

This statement directly contradicted the other one, and would if it stood alone completely destroy the defendant's plea of limitation. But probably Prof. Butte did not mean exactly what he said. Further on in his cross-examination the witness modified his testimony as to when the running of limitation would start by fixing the time at January 1st after delivery instead of at delivery. (Record, p. 94). He testified that under the statutes of Germany if the contract in question was required to be in writing, then in order to toll the statute of limitation by an acknowledgement or new promise it must be in writing. (Record, p. 94). But this statement is right in the teeth of Sec. 208, which, without distinction between contracts required and those not required to be in writing, declares that if the claim is acknowledged by part payment, payment of interest, "or in any other manner," the running of limitation is interrupted. (Record, p. 99). He also testified in answer to the court's question that in a case (like the present one) where the contract itself made arbitration a condition precedent to the accrual of any liability or the maintenance of any suit and made the result of the arbitration conclusive upon the parties, and the circumstances were such that the arbitration proceedings could not be finished and the award had within six months from date of delivery of the goods, nevertheless the claim would be outlawed by the German law if suit was not brought within six months after delivery. If he was correct in this opinion, it would convict the German law of an absurdity and injustice that we venture to say does not attach to the jurisprudence of any enlightened country. But we think he was wrong in his interpretation and that Sec. 477 was not intended to apply to such a case; and this is the view taken by the trial court. Furthermore, such a construction of the law as the witness offered is in our judgment directly contrary to the plain terms of Sec. 202, which provides that "prescription is suspended so long as

the performance is stayed or the obligor is temporarily entitled on any other ground to refuse performance." (Record, p. 99.) The performance by either the Birge-Forbes Company or Heye of the obligation to make good the deficiencies in the cotton by the payment of money was certainly stayed until the arbitrations were had, and said obligors were entitled to refuse performance until the arbitrations were had, on the ground that the arbitrations had been agreed upon beforehand as the exclusive method of determining whether the cotton came up to the contract, and, if not, what amount of money represented the damages for its failure to do so.

It seems to us quite clear that Secs. 220 and 218 (referred to in Sec. 220) apply to this case, especially in view of the fact that under the rules of the Bremen Cotton Exchange cases which have been appealed from the decisions of the "Classers" to the "Appeal Committee" and then arbitrated by that body are "non-appealable." Rule 17 says:

> "The decisions of the Arbitrators, and Appeal Committees are final and binding, and any appeal to courts of law is excluded." (Record, p. 19).

The Board of Arbitration of the Bremen Cotton Exchange is either a "court of arbitration" or a "special tribunal," within the meaning of Sec. 220, and action by it brings into operation Sec. 218 and makes the period of limitation 30 years from the date of the final award. (Record, p. 99). One of the definitions of "tribunal" given in the latest edition of Bouvier's Law Dictionary is "Any court, forum, or judicial body." And one definition of that word given in Webster's New International Dictionary is "A person or body of persons having authority to hear and decide disputes so as to bind the disputants." It is significant that the court, before he had ever read or heard Sec. 220 of the German Civil Code, referred, in one of his questions to Prof. Butte, to the board of arbitration constituted by the Bremen Cotton Exchange as a "tribunal." (Record, p. 95).

It may also be worth while to note that under the German Code if a given case does not fall within any of

the specified limitation provisions it will be governed by Sec. 195, which reads: "The regular period of prescription is 30 years." (Record, p. 99).

In the above discussion we have endeavored to show that the finding of the trial court against the defendant's plea of limitation was entirely correct and should meet with the approval of this court even if we were to suppose this an equity appeal, giving the appellate court power over the facts. We now desire to advance another and independent view of the matter, which we think completely demolishes all the contentions of the Birge-Forbes Company on the limitation question in view of the condition of the record as it comes to this court and in view of the limited province of this court in reviewing actions at law on writ of error. As is fully shown by the authorities cited above, foreign laws are treated as matters of fact, are the subjects of proof, and a finding made as to what the law of a foreign country is on a given point is a finding of fact. In *Paper Co. vs. Warner*, 99 Fed., 187, Judge Lacombe said:

> "The referee was called upon to find, and did find, what provisions of English statutes were in force, and what was the law of England, at the several dates with which the case is concerned, touching the power of corporations created under English statutes to amend their articles of association, and to refuse to register transfer of stock, and what liens were or were not created under English law by transactions such as took place in this case, and what were the relative priorities of such liens under the same law. It is elementary law that our courts do not take notice of foreign law, unless it be proved as a fact in the case. *Talbot vs. Seeman*, 1 Cranch, 38, 52 L. Ed., 15; *Liverpool & G. W. Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 446; 9 Supt. Ct., 469, 32 L. Ed., 788. The findings of the referee, therefore, as to English law, statute or common, are findings of fact not reviewable here. This disposes of the 30th, 32nd, 33rd, 36th and 37th assignments of error. The 31st assignment covers an exception to a finding of the referee that upon May 15, 1893, the defendant

amended its articles of association in certain specified particulars. This was either purely a question of fact, or if it were a mixed question, depending in part upon a determination as to what procedure would, under English law, effect an amendment, the finding was nevertheless a finding of fact."

In *Coram vs. Davis*, 103 N. E., 1027, the Supreme Judicial Court of Massachusetts said:

"It has been found by the master that under the law of Montana, where apparently the contract was made, it created a joint and several liability. As a finding of fact this is binding if it is a Montana contract."

In *Railway Co. vs. Phillips*, 196 Fed., 328, the well settled rule governing the Circuit Courts of Appeals in actions at law brought up by writ of error is stated by Judge Morrow as follows:

"In a case of this character, this court is confined in its review to the consideration of exceptions taken at the trial to the admission or rejection of evidence and to the charge of the court and its refusal to charge. We have no concern with questions of fact or the weight to be given to the evidence which was properly admitted. *Aetna Life Insurance Co. vs. Ward*, 140 U. S., 76, 91; 11 Sup. Ct., 720; 35 L. Ed., 371; *Erie Railroad Co. vs. Winter*, 143 U. S., 60, 75; 12 Sup. Ct., 356; 36 L. Ed., 71."

In the instant case the Circuit Court of Appeals said:

"Even if Heye had been in a position to defeat the claims under a plea of limitation, not having so defeated them, but having done that which the contract contemplated that he should do, and which common honesty required he should do, he is entitled to reimbursement from his principal. As between him and defendant, section 477 manifestly has no application."

Plaintiff in Error criticizes this proposition and cites some authorities to the contrary. While the decision of

the court affirming the judgment below can easily be sustained without maintaining the proposition referred to, nevertheless such proposition is supported by respectable authority as well as by sound morality.

In *Cahill vs. Bigelow*, 18 Pick., 369, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts held that the trustee is a trustee process, or garnishment, had a right to observe his moral obligation and make good his oral guaranty, which was unenforecable under the statute of frauds, though the result was to defeat the claim of the attaching creditor.

In *Lee vs. Stowe*, 57 Tex., 444, a guarantor who could have avoided payment under the statute of fraud went ahead and made payment and then sued his principal for indemnity, who pleaded that the payment made by the guarantor was voluntary and unnecessary, and hence that no recovery against the principal should be had. The court said:

> "If the plaintiff at the request of the firm of M. C. Lee & Co., verbally guaranteed the payment of bills of goods which they purchased, then upon payment of such bills by the plaintiffs when they became due they are entitled to recover the same, whether such payments were made before or after the dissolution of the firm of M. C. Lee & Co., and if after dissolution, whether there was notice of that fact or not; and this, notwithstanding the plaintiffs might have interposed the statute of frauds as a defense had they been sued by the sellers upon their verbal guarantee. *Beal vs. Brown*, 13 Allen, 115; *Cahill vs. Bigelow*, 18 Pick., 372; *Ames vs. Jackson*, 115 Mass., 512; *Brown on Statute of Frauds*, 116, 135; *Godden vs. Pierson*, 42 Ala., 374.
>
> "It is true that the verbal guaranty was an imperfect obligation as between the sellers and plaintiff's, but it was upon valuable consideration, and, as between the plaintiff and M. C. Lee & Co., not in violation of the statute of frauds, or of any rule of public policy.

> "It was an obligation morally binding, which M. C. Lee & Co. had no right to ask them to violate by interposing the statute of frauds as a defense; nor had they even the right, when the bills matured and they failed to meet them themselves, to ask the plaintiffs to refrain from promptly paying them as they were morally bound to do. 18 Pic., 369."

It is true that neither of the two cases cited involved the statute of limitations, but we are unable to see why that statute should be held any more sacred than the statute of frauds.

VALUE OF GERMAN MARKS.

Inasmuch as the court could take judicial notice of the value of a German mark, expressed in terms of American money, and inasmuch as the evidence on the trial showed without substantial dispute that such value was 23.8 cents, the court properly took such value as the basis for determining the amount of the verdict to be directed. Furthermore, defendant, by moving the court for a directed verdict in its favor, waived and surrendered any right to claim that there were issues that should go to the jury.

By agreement the following statement was made and put into the record:

> "By agreement of counsel for defendant, plaintiff's counsel was permitted to state as evidence that Webster's New International Dictionary states the value of a German mark in American money to be 23.8c; that is, 23.8c is the standard value of a German mark." (Record, p. 91).

N. B. Birge, president of the defendant company, testified in behalf of the defendant that according to the New York quotations of exchange on Germany a German mark was worth at the time of the trial 18⅛c, but on cross-examination he admitted that his statement was based solely upon the foreign exchange market in New York and that he had no information

as to what the actual German money, if here in America, would be worth in American money. (Record, p. 96).

On this questio nof the value of the German mark, the court said in his charge:

> "The remaining question is, for how much shall the verdict be? The court as a matter of law is compelled to take judicial knowledge of the fact that a German mark is worth 23.8c in American money. It is contended by the defendant company that at this time a German mark is only worth 18⅛c. I have not thought it necessary to investigate any more fully than I have, but I pause here to call attention to the fact that there is no evidence in this record that at the time the plaintiff, Carl R. Heye, paid off the claims of the reclamation claim holders, the German mark was depreciated to any extent. Now ordinarily the measure of liability would be what he paid at the time and place of the payment. The court judicially knows the normal value of the German mark is 23.8c and there is no evidence showing that when Carl R. Heye paid the claims of the reclamation claim holders that the German mark was worth less than 23.8c. There is testimony in the record which is undisputed from any source that a party desiring to purchase a German exchange at this time could purchase it estimating the value of a German mark at 18⅛c. The question for me to determine is whether in directing this verdict I shall be governed by the value of a German mark at 23.8c, as the court finds it to be, or 18⅛c, as the only witness who has testified to the value of it in the purchase of exchange states it to be at this time. I am of the opinion that in expressing this verdict the equivalent in dollars and cents of the German marks paid by the plaintiff to the reclamation claim holders on the 6th day of May, 1914, that I should estimate the American money which is expressive of that amount of German marks at the rate of 23.8c.

"I find therefore that the plaintiff is entitled to recover from the defendant company the amount of money paid by him on May 6th, 1914, which amount in German money was 159,715.97 German marks, and the court finds that the American equivalent of that in American money at the time of the payment, to-wit, May 6th, 1914, was $37,-533.25. Now the plaintiff is entitled to interest on that amount from the date of the payment until the rendition of this judgment. The time for which interest should be estimated, according to my recollection, is two years and eight months, and the rate per cent at which interest could be calculated is 4%. I therefore calculate the interest, at 4% for two years and eight months, which interest, according to my calculation, amounts to $4,003.54, being a total of principal and interest to the date of this trial on this day of $41,536.79. Under the view of the law which the court takes, and the evidence adduced on the trial, I direct the jury to return a verdict for plaintiff for $41,536.79." (Record, p. 113).

The opening sentence of the court's charge shows that each side submitted to him an oral motion to direct a verdict in its favor. (Record, p. 104).

The defendant also presented to the court six special instructions, all of which were peremptory charges to find for the defendant, except the fifth, which itself was a peremptory instruction to treat the German mark as worth 18⅛c, as claimed by defendant. (Record, pp. 102-103).

AUTHORITIES.

7 Encyclopedia of Evidence, 906.
Hogue vs. Williamson, 85 Tex., 553.
2 Foster's Federal Practice (5th Ed.), p. 1556.
Sena vs. American Turquoise Co., 220 U. S., 497, 55 L. Ed., 559.
Melton vs. Trust Co. (C. C. A.), 190 Fed., 126.

ARGUMENT.

In 7 *Encyclopedia of Evidence,* 906, this language is used:

> "The value of foreign currency may also be judicially known when it is a matter of common knowledge."

We suppose that our courts would not take judicial knowledge of the value in American dollars of the money of a country of small commercial or financial importance, such as Serbia, or perhaps Mexico; but that they would judicially know the value of the money issued by great commercial nations, such as England, Germany or France, especially if the time as of which the value was to be determined was known to current history as a time of peace and prosperity for the nation in question and as a time when nothing extraordinary had happened to depreciate such money below its ordinary and standard value.

Obviously Heye was entitled to recover from the Birge-Forbes Company complete reimbursement, no more and no less. If he paid to the creditors on May 6th, 1914 (which date the court judicially knows was before the outbreak of the war in Europe) German marks worth 23.8c each, and was now permitted to recover from his principal only the value of the same number of marks reckoned at 18⅛c each, it is perfectly plain that he would not obtain complete reimbursement.

The case of *Hogue vs. Williamson,* 85 Tex., 553, cited by plaintiff in error, is in point here. In concluding the opinion the court said:

> "We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its *maturity,* he had made a *prima facie* case, and our opinion will be certified accordingly."

The above shows that the value of the foreign money *at the maturity of the debt* is the thing to be

determined, its value at any *subsequent time* being immaterial. Now, the date of the maturity of the Birge-Forbes Company's obligation to reimburse Heye was May 6th, 1914, the date he made the payments in question to the Bremen creditors. And it was determined both by judicial cognizance and by evidence that the value of the German mark at that time was 23.8c.

It should also be remembered that this question of the value of the German mark is a matter of fact, and that it cannot be said that the court's finding upon it is without any evidence to support it.

Defendant in error respectfully prays that the judgment of the Circuit Court of Appeals be affirmed.

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BIRGE-FORBES COMPANY *v.* HEYE.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 76. Argued November 13, 14, 1919.—Decided January 12, 1920.

A judgment for an alien enemy is objectionable only in so far as it may give aid and comfort to the other side in the war. P. 323.

A judgment recovered in the District Court by an alien enemy before he became such, the satisfaction of which was delayed by the other party's appeal until the intervention of war, may properly be reviewed, during the war, and affirmed with directions that the money be paid to the clerk of the trial court to be turned over to the Alien Property Custodian; and a motion to dismiss or suspend the action is correctly denied. *Id.*

Where a broker who became liable for his principal on several arbitration awards sued for their aggregate amount and was given a directed verdict and a judgment against the principal for the part which he

had then paid, and, having paid the remainder, sued again to recover that also, *held*, that the former judgment was conclusive in the second action as to the validity of the awards, it appearing, not only from the petition and judgment, but from other parts of the record of the former case, including the answer, the judge's charge and the opinion of the Circuit Court of Appeals, that the validity of all the awards alike was there in issue and was sustained. P. 323.

In determining whether a former judgment, given upon a directed verdict, involved the same issues of fact as are presented in a second action before the same judge in which both parties submit the point by requests for a peremptory instruction, especial weight attaches to the judge's decision. P. 324.

The objection that the deposition of a plaintiff in the District Court cannot be taken on his own behalf is waived by a stipulation waiving time and notice and allowing the officer to proceed to take and return it on interrogatories. *Id.*

That in the return of foreign depositions the officer commissioned did not put them into the mail and certify to the fact on the envelopes, as required by a state law, is immaterial where the war made compliance impossible and where the officer transmitted them in the only practicable way, though an American consul to the State Department and thence by mail to the clerk. *Id.*

The six months' limitation of the German Civil Code, § 477, on claims for defect of quality in goods sold, does not apply to awards of arbitration based on such claims. P. 325.

In an action to recover amounts paid on defendant's account in Germany, it is not error to take the value of the German mark at par in the absence of evidence that it had depreciated when the plaintiff made the payments. *Id.*

248 Fed. Rep. 636, affirmed.

THE case is stated in the opinion.

Mr. Henry O. Head, with whom *Mr. Jesse F. Holt* was on the briefs, for petitioner, made the following points:

The court below should have sustained the motion to abate the suit, and postpone its consideration until the end of the war, the plaintiff being an alien enemy. The principle is illustrated by the discussion in *Hanger* v. *Abbott*, 6 Wall. 532; *Bishop* v. *Jones*, 28 Texas, 294, 316; *Plettenberg, Holthaus & Co.* v. *Kalmon & Co.*, 241 Fed. Rep.

605; *Howes* v. *Chester*, 33 Georgia, 89; and Corpus Juris, 117. In *Owens* v. *Hannay*, 9 Cranch, 180, nothing was said of this matter and the ruling was confined to a question concerning jurors. *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, is direct upon this point.

The acts of Congress do not authorize the taking of the deposition of a party to a law case in the District Court in advance of trial. By the Act of 1906, 34 Stat. 618, competency of witnesses is determined by the law of the State. By the Texas law, Art. 3688, a party is competent as a witness. Section 863, U. S. Rev. Stats., provides for taking depositions *de bene esse* within the United States; but it has been often decided that this does not authorize depositions abroad, and that authority for them must be by *dedimus* obtained from the court, under § 866, to be awarded or withheld in the court's discretion. *United States* v. *Parrott*, Fed. Cas. No. 15,999.

In this case, sole reliance was on the Act of 1892, 27 Stat. 7, which provides that depositions of witnesses in the federal courts may be taken "in the mode prescribed" by the state laws.

As to whether these federal statutes authorize the taking of depositions of parties before the trial, or are confined to ordinary witnesses, there is much difference of opinion. See *Blood* v. *Morrin*, 140 Fed. Rep. 918; *Hanks Dental Assn.* v. *International Tooth Crown Co.*, 194 U. S. 303; *Union Pacific Ry.* v. *Botsford*, 141 U. S. 250; *Ex parte Fisk*, 113 U. S. 724; *Frost* v. *Barber*, 173 Fed. Rep. 847; Simpkins' A Federal Equity Suit, 3d ed., 506 *et seq.* Conceding that this may be done within the United States, the authority could come only through a *delimus*, or the Act of 1892, *supra*, and with regard to the latter there is an important question whether it gives the right or is restricted to the mode and manner of taking after authority to take has been secured from the court.

The Act of 1892 only admits a deposition, even in this

country, when it has been taken in the mode prescribed by the laws of the State. It is conceded that the depositions here in question were not returned in compliance with the Texas Statutes. Art. 3660 (2284) (2229). The decision in this case, in conflict with *Pullman Co.* v. *Jordan*, 218 Fed. Rep. 573, is to the effect that the court has the power to substitute another mode which it thinks just as good; notwithstanding the irregularities, the depositions are to be received unless the complaining party is able to show they have been tampered with. This is not in accord with the Texas decisions. *Garner* v. *Cutler*, 28 Texas, 175; *Laird* v. *Ivens*, 45 Texas, 621; *Barber* v. *Geer*, 94 Texas, 581, 584. The construction of the state statute is for the state court. *Smiley* v. *Kansas*, 196 U. S. 447, 455; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541, 551.

All that the stipulation waived was the taking of the deposition upon the original instead of copies of the interrogatories, together with a waiver of the time, notice and copy of the interrogatories, which would have been necessary had they been served upon the defendant in the usual way. Nothing was waived as to the manner of taking and returning the depositions; and to give the agreement the construction given it by the trial judge would absolutely preclude attorneys from making any waiver of any kind with reference to the taking of depositions, as it would subject them to the peril of having evidence used against them which had been taken and returned in the most informal and unreliable way.

All of the authorities agree that a judgment is *res judicata* in a second suit only as to matters that were directly presented and decided in the first, and is not *res judicata* as to matters which might have been decided, but were not in fact passed upon, no matter how conclusive the evidence may have been. *Russell* v. *Place*, 94 U. S. 606; *Landon* v. *Clark*, 221 Fed. Rep. 841; *In re William S. Butler & Co.*, 207 Fed. Rep. 705; *Smith* v. *Mosier*, 169

Fed. Rep. 430, 446; *McAnally* v. *Haynie*, 17 Tex. Civ. App. 521. Here it must be conceded that all that was decided in the first suit was that enough valid awards were made to require the payment by plaintiff of $36,610.96. There was no decision as to any particular awards, or that any awards over that amount were made. Had there been only a single award and various sums depending on this award, the suing for and recovery of a single one of these sums, to which the adjudication of the existence of the award was necessary, would have been an adjudication of its existence in a suit brought for recovery of any or all of the other sums. *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638. In the instant case, however, there was no single award. On the contrary, there were 160 original awards and 34 appeal awards, making 194 in all. The awards were made in behalf of different persons; on different shipments, arriving at different times; on different claims, where there were different claimants, and by different arbitrators.

Plaintiff's claim was barred by § 477 of the German Code.[1] This was made certain by expert testimony and, if the court is not bound by that, is correct on the face of the statute.

There is no legal presumption that the value of German marks in Texas was their par value. The burden is on him who sues upon an obligation payable in a foreign currency to allege and prove as a part of his case the value of the foreign currency in the currency of the country where the trial is being had. *Kermott* v. *Ayer*, 11 Michigan, 181; *Modawell* v. *Holmes*, 40 Alabama, 391, 405; *Feemster*

[1] "The claim of the buyer for rescission of sale or for reduction of purchase price, as well as the claim for damages on account of defects in a guaranteed quality is outlawed in so far as the seller has not fraudulently concealed the defect, in the case of movable things, in six months from the delivery of the goods; in the case of real estate in one year from the transfer of possession. This limitation period can be extended by agreement."

v. *Ringo*, 5 T. B. Mon. 336; *Hogue* v. *Williamson*, 85 Texas, 553; 2 Wharton on Evidence, 3d ed., § 335; 13 Encyc. of Evidence, 425; 23 Cyc. 791, 792.

Mr. Robert M. Rowland, with whom *Mr. Newton Hance Hassiter* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by Heye, a cotton broker in Bremen, against the petitioner, a cotton exporter in Texas, to recover sums that Heye had to pay on its account. The payments were made upon cotton sold by Heye as the petitioner's agent, to different buyers, for alleged failure of the cotton to correspond to the description upon which the price was based. In pursuance of the contracts and the rules of the Bremen Cotton Exchange the claims of the buyers were submitted to arbitration, which resulted in awards against the plaintiff for a total of 312,749.30 German marks, alleged to be equal to about $74,820.52. Before the present suit was brought another one had been carried to judgment in the same district, in which that amount was claimed. At that time Heye had paid only $36,610.96 of the awards. The judge directed a verdict for the sum that the plaintiff had paid and another item not now in issue. Heye now has paid the whole and brings this suit to recover the amount of the later payment not embraced in the former judgment. He prevailed in the District Court, and the judgment was affirmed with a modification as to payment by the Circuit Court of Appeals. 248 Fed. Rep. 636. 160 C. C. A. 536. The main question on the merits is whether the former judgment was conclusive as to the validity of the awards, but that upon which the certiorari was granted was a preliminary one, as is shown by the fact that certiorari was denied in the former suit. 234 U. S. 759. After the case had been

taken to the Circuit Court of Appeals a motion was made to dismiss or suspend the suit on the ground that Heye had become an alien enemy by reason of the declaration of war between Germany and the United States. The Circuit Court of Appeals, however, affirmed the judgment with the modification that it should be paid to the clerk of the trial court and by him turned over to the Alien Property Custodian, with further details not material here.

Upon the last-mentioned question, although it seemed proper that it should be set at rest, we can feel no doubt. The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall speaking for the Court in *Owens* v. *Hannay*, 9 Cranch, 180. *Kershaw* v. *Kelsey*, 100 Massachusetts, 561, 564. There is nothing "mysteriously noxious" (*Coolidge* v. *Inglee*, 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger* v. *Abbott*, 6 Wall. 532, 536. *M'Connell* v. *Hector*, 3 B. & P. 113, 114. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct. When the alien enemy is defendant justice to him may require the suspension of the case. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 22.

On the merits the first question is whether the former judgment was conclusive as to the validity of the awards, assuming them to have been identified as the same that were sued upon in the former case. Taking merely the former declaration and judgment it could not be said with certainty that some of the awards might not have been held invalid and that the defendant had not satisfied the

whole obligation found to exist. But we have before us the fact that the Court directed a verdict and the charge. From the latter, as also from the answer, apart from a general denial, it appears that the awards were dealt with as a whole and that the objections to them were general. The objections were overruled, and the Court assumed that the awards were obligatory, but cut down the amount to be recovered to the sum that had been paid. The case went to the Circuit Court of Appeals and the same things appear in the report of the case there. 212 Fed. Rep. 112. 128 C. C. A. 628. (Certiorari denied. 234 U. S. 759.) In the present case both parties moved the Court to direct a verdict. *Beuttell* v. *Magone*, 157 U. S. 154, 157. *Empire State Cattle Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 210 U. S. 1, 8. Taking that and the fact that the same judge seems to have presided in both suits into account we should be slow to disturb his decision that the issue was determined in the former one if we felt more doubt than we do. But we are satisfied the decision of the two Courts below was right.

We shall deal summarily with two or three highly technical arguments urged against the affirmation of the judgment. One is that the depositions of Heye and a witness were not returned as required by the Texas statute providing for taking them, with a suggestion that, as Heye was a party, his deposition could not be taken at all. As to the latter point it is to be noticed that it did not present an attempt to fish for information from the opposite party and that an agreement was made that "time, notice and copy are hereby waived," and that the "officer may proceed to take and return the depositions of the witness on the original direct and cross interrogatories, but commission is not waived." Whatever may be the general rule, (as to which see *Blood* v. *Morrin*, 140 Fed. Rep. 918,) we think that this objection is not fairly open. As to the mode of return not having followed strictly the Texas

statute, because the officer to whom the commission was directed did not put the depositions into the mail and certify on the envelopes that he had done so, a sufficient answer is that that course was impossible owing to the war, and that the officer did transmit the depositions in the only practicable way. He gave them to an American consul and had them transmitted to the Department of State and then through the mail to the clerk. The integrity of the depositions is not questioned, the statute was complied with in substance, and justice is not to be defeated now by a matter of the barest form.

We see no error in the finding that § 477 of the German Civil Code did not bar the claim. Assuming the question to be open the Court was warranted in finding that a six months' limitation to claims for defect of quality did not apply where the claims had been submitted to arbitration and passed upon. The same is true with regard to the taking the value of the German mark at par in the absence of evidence that it had depreciated at the time of the plaintiff's payments. On the whole case our conclusion is that the judgment should be affirmed.

Judgment affirmed.